FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,

Petitioner,

v.

DIRECTOR OF PATUXENT INSTITUTION,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General
of Maryland,
EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
DONALD R. STUTMAN,
JOSEF ROSENBLATT,
HARRY A. E. TAYLOR,
Assistant Attorneys General
of Maryland,
One South Calvert Street,
Baltimore, Maryland 21202,
(301) 383-3737.
Attorneys for Respondent.

April 17, 1972

The Daily Record Co., Baltimore, Md. 21203

INDEX

Table of Contents

Table of Citations

Cases

Miscellaneous

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-5144

EDWARD LEE McNEIL,

Petitioner,

v.

DIRECTOR OF PATUXENT INSTITUTION,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF OF RESPONDENT

OPINIONS BELOW

1. *State of Maryland, ex rel. Edward Lee McNeil v. Patuxent Institution, Criminal Court of Baltimore.*

2. *Edward Lee McNeil v. Director, Patuxent Institution,* Court of Special Appeals of Maryland, Sept. Term, 1970, No. 150, unreported per curiam opinion dated April 26, 1971 (J.A. 37).

JURISDICTION

The jurisdictional requisites are adequately set forth in Petitioner's Brief.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Milita, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

Amendment XIV

Section 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

ANNOTATED CODE OF MARYLAND

Defective Delinquents — Article 31B

§ 6. Request for examinaton.

(a) *For whom requests may be made.* — A request may be made that a person be examined for possible defective delinquency if he has been convicted and sentenced in a court of this State for a crime or offense committed on or after June 1, 1954, coming under one or more of the following categories: (1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) Physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment, in a criminal court of this State. A person convicted and sentenced for a crime or offense within one of the categories listed above in this subsection, except that such crime or offense was committed before June 1, 1954, shall be subject to this article with the same effect as if said crime or offense had been committed after June 1, 1954, if after said date such person is adjudged to have broken the terms

of any parole or probation on which he has been released from said sentence.

(b) *Who may make requests.* — The request for such examination may be made by the Department of Correction or by the State's attorney or assistant State's attorney who prosecuted the person for a crime or offense specified hereinabove in this section, on any knowledge or suspicion of the presence of defective delinquency in such person. Such person himself, or his attorney in his behalf, may make such a request of the court. Whenever a request for examination comes from any such source the court may order such person to be examined by the institution for defective delinquents to ascertain if he or she is a defective delinquent. The court also may make such an order on its own initiative. A copy of any order for examination shall be served upon the person to be examined.

(c) *When requests may be made.* — Such an examination may be requested and made at any time after the person has been convicted and sentenced for a crime or offense specified hereinabove in this section, provided that the said person has been sentenced to a period of confinement in a penal institution or is then serving such a sentence. No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted or who is within six months of the expiration of his sentence.

(d) *How requests made.* — The request for such an examination shall be by petition filed with the court having custody of or jurisdiction over the said person, stating therein the reasons for suspecting or supposing the presence of defective delinquency in the said person. The court in ordering such examination shall do so by formal

written order directed to Patuxent Institution. When the person to be examined is in the custody of the Department of Correction, such order shall also be directed to the Department of Correction, which shall forthwith cause the transfer of the person to the custody of Patuxent Institution.

(e) *Custody after examination ordered; jurisdiction of defendant.* — After the court has ordered an examination to be made under this section, said person shall be retained in custody, initially of the Department of Correction until his transfer to Patuxent Institution and thereafter in the custody of Patuxent Institution, until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired. The court which last sentenced the defendant, whether or not the term of court in which he was sentenced has expired shall retain jurisdiction of the defendant for the purpose of any of the procedures specified in §§ 6, 7, 8 or 9 hereof; except that the Criminal Court of Baltimore City and the Circuit Court of Anne Arundel County shall for such purposes have jurisdiction of a person last sentenced by the Municipal Court of Baltimore City and the People's Court of Anne Arundel County, respectively.

§ 7. Examinations.

(a) *By whom made; report of findings to court; time spent in institution, etc., credited on sentence.* — Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist. They shall assemble all pertinent in-

formation about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history. On the basis of all the assembled information, plus their own personal examination and study of the said person, they shall determine whether in their opinion, or in the opinion of a majority of them, the said person is or is not a defective delinquent. They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or three months, before expiration of his sentence, whichever first occurs. If the substance of the report is that the said person is not a defective delinquent, he shall be retained in the custody of the Department of Correction under his original sentence as if he had not been examined for possible defective delinquency. Provided, however, that the said person shall be returned to the custody of the Department of Correction with full credit for such time as he has already spent in the institution for defective delinquents or within the custody of the Department of Correction including such allowances (or disallowances) relating to good behavior and/or work performed as the Board of Correction may determine under the provisions of § 688 of Article 27 of the Code.

(b) *Additional examinations by psychiatrist in certain cases.* — In addition to the examination provided in the foregoing subparagraph (a), whenever a request has been made to examine any person for defective delinquency, other than a request made by such person himself or by his attorney on his behalf, and whenever the

court has on its own initiative ordered examination of any person, then such person shall be entitled, upon request, to be examined by a practitioner of psychiatry of his own choice for the purpose of determining whether he is a defective delinquent within the terms of this article; and the reasonable costs of such examination shall be defrayed by the State of Maryland from the appropriations to the judiciary, in such amount as may be approved by the court. The report of examination made by such psychiatrist shall be submitted in writing addressed to the court.

QUESTIONS PRESENTED FOR REVIEW

I. Whether an individual tried, convicted, and sentenced for a particular category of crimes and then referred by court order to Patuxent for evaluation is thereby denied due process or possesses a right to remain silent or a right to refuse to cooperate with professional staff seeking an evaluation of his mental condition.

II. Whether an individual tried, convicted, and sentenced for a particular category of crimes and then referred by court order to Patuxent for evaluation has his constitutional rights violated by retaining him until such time as he cooperates with the professional staff seeking to determine whether or not he is a defective delinquent.

APPENDIX DESIGNATION

Respondent notes the references by Petitioner to the record in *Murel v. Baltimore City Criminal Court*, No. 70-5276, argued in this Court on March 28-29, 1972. Respondent has no objection to citation to the same in order to provide a full and accurate background for a determination of the issues herein.

For the purpose of reference, the Joint Appendix filed in the United States Court of Appeals for the Fourth Circuit in *Tippett v. Maryland*, 436 F. 2d 1153 (4th Cir., 1971) will be hereinafter designated as "(J.A. 4)." The Joint Record Abstract filed in the Court of Appeals of Maryland in *Director v. Daniels*, 243 Md. 16, 221 A. 2d 397 (1966) will be hereinafter designated as "(J.A. Md.)." Citations to the Joint Appendix filed in this case will be designated as "(J.A.)" in conformity with Petitioner's Brief.

STATEMENT OF THE CASE

History and Background of Article 31B, Annotated Code of Maryland

Article 31B, Annotated Code of Maryland evolved because of the recognition that there existed a group of offenders whose crimes resulted from a mental abnormality or character defect which resulted in persistent antisocial conduct due to lack of emotional control and sometimes accompanied by a deficient intelligence. These individuals did not respond to normal penalogical methods, and it was felt that they should be placed in an institution providing proper psychiatric care.

The Act was a culmination of two studies made by two committees, one appointed by the Governor of Maryland in 1947, and one appointed by the Maryland Board of Corrections. The two groups made a joint recommendation which ultimately resulted in the passage of Article 31B. See generally, *Director v. Daniels*, 243 Md. 16, 221 A. 2d 397 (1966); *Sas v. Maryland*, 334 F. 2d 506 (4th Cir., 1964); "Research Report No. 29," Research Division of the Legislative Council of Maryland (December, 1950).

The Act sets up a comprehensive scheme for referral, examination, commitment and release. Following a conviction and the imposition of an active prison sentence for:

> "(1) A felony; (2) a misdemeanor punishable by imprisonment in the penitentiary; (3) a crime of violence; (4) a sex crime involving: (A) physical force or violence, (B) disparity of age between an adult and a minor, or (C) a sexual act of an uncontrolled and/or repetitive nature; (5) two or more convictions for any offenses or crimes punishable by imprisonment . . ." Art. 31B, § 6(a).

An individual may be referred to Patuxent Institution for examination and evaluation as to his status as a defective delinquent by a request directed to the court from the State's Attorney, the Department of Corrections, the person himself, his attorney in his behalf, or the court on its own initiative. Article 31B, §6(a) and (b). Requests may be made for examination unless the individual referred has been released from confinement for the particular crime of which he was convicted, or who is within six months of the expiration of his sentence. A copy of the order of court referring an individual to Patuxent Institution for examination and evaluation is served on the individual referred. Article 31B, §6(b) and (c).[1]

Patuxent Institution is required by statute to:

> ". . . [A]ssemble all pertinent information about the person to be examined, before proceeding therewith, including a complete statement of the crime for which he has been sentenced, the circumstances of such crime, the court in which he was sentenced, the nature of the sentence, copies of any probation or other reports which may have been made about him, and reports as to his social, physical, mental and psychiatric condition and history." Article 31B, § 7(a).

---

[1] This section was amended in 1971. The statutory language under which Petitioner was referred to Patuxent was as follows: "No such examination shall be ordered or made if the said person has been released from confinement for the particular crime or offense of which he was convicted." This amendment would not have affected Petitioner's referral to Patuxent Institution.

The report to the court must be filed "not later than six-months from the date said person was received in the institution for examination, or three months, before expiration of his sentence, whichever first occurs." Article 31B, § 7(a).[2]

If the report of Patuxent Institution states that the individual is not a defective delinquent, he is returned to the custody of the Department of Corrections under his original sentence with credit for all time spent at Patuxent Institution. Article 31B, § 7(a). Since 1955, Patuxent Institution has diagnosed 1958 individuals, of whom 34 percent were found by the staff not to be defective delinquents. "Patuxent Institution, Annual Report, 1971."

If the report concludes that the individual is a defective delinquent, he is given a full and prompt judicial hearing in which he is entitled to counsel; trial by jury; the services of an independent psychiatrist at the expense of the State; full access to all records, reports and papers in possession of Patuxent Institution; and the right to subpoena witnesses. Article 31B, § 8(a), (b) and (c). Since 1955, of those patients having an original commitment proceeding before a court, 13 percent were found not defective delinquents, and of those patients having an original commitment proceeding by a jury, 20 percent were found not defective delinquents.

The hearing to determine whether the individual is a defective delinquent is held "no less than 30 days follow-

[2] This section was also amended in 1971. The section at the time of Petitioner's referral to Patuxent Institution read as follows: "They shall state their findings in a written report addressed to the court, not later than six months from the date said person was received in the Institution for examination, or before expiration of his sentence, whichever last occurs." This amendment, also, would have had no effect on Petitioner's status at Patuxent Institution.

ing designation of counsel, unless acceleration of the time is requested by the person or his counsel." Article 31B, § 8(b).[3]

If the court or jury finds the individual to be a defective delinquent, he is committed to Patuxent Institution for an indeterminate period with the right of judicial review after the expiration of the greater of two years or two-thirds of his original sentence and at three-year intervals subsequent to the original redetermination hearing. Article 31B, §§ 9(b), 10(a) and (b). If the court or jury finds that he is not a defective delinquent, he is returned to the custody of the Department of Corrections to serve his original sentence with full credit for the time spent at Patuxent Institution. Article 31B, § 9(a). Appellate review of original or redetermination hearings is preserved. Article 31B, §§ 11, 11A.

The Institutional Board of Review by statute (§ 12) consists of the Director of Patuxent Institution, the three Associate Directors, the Professor of Constitutional Law of the University of Maryland School of Law, who is a member of the Advisory Board of Patuxent Institution, one of the members of the Maryland Bar who is a member of the Advisory Board, and a sociologist appointed by the Board of Governors of Patuxent Institution from the faculty of an accredited institution of higher education in Maryland. The Act provides that the Institutional Board of Review

[3] Article 31B, § 6(e) places the patient in the custody of Patuxent Institution "until such time as the procedures of this subtitle for the determination of whether or not said person is a defective delinquent have been completed, without regard to whether or not the criminal sentence to which he was last sentenced has expired." This section refers to the judicial hearing following the report of the Institution, which must be made within six months of the patient's arrival at Patuxent Institution or three months before the expiration of the patient's sentence. Article 31B, § 7(a).

shall review and thoroughly re-examine every person committed to Patuxent Institution at least once every calendar year. Such review and examination is used to determine whether the person shall remain classified as a defective delinquent, and the Act further provides that in ". . . making such determination, the board shall assemble such information, use such tests and follow such procedures as then are being utilized to indicate the presence of defective delinquency." Article 31B, § 13(b). The Board is required to make a recommendation for the future status and treatment of each patient, in writing, which recommendation is filed in the patient's record at Patuxent Institution. Article 31B, § 13(a) and (b). Further review is available through the use of the Writ of Habeas Corpus. Article 31B, § 10(c).

The Institutional Board of Review has the power to grant "status," that is, leaves of absence, holiday leave, work release and parole, and to report to the committing court when it finds the patient no longer a defective delinquent. It may also recommend release of the patient unconditionally without regard to whether his original criminal sentence is still in effect. Article 31B, § 13(b), (d) and (f). In the past several years, the number of patients committed to Patuxent Institution as defective delinquents has about equalled the number paroled by the Institutional Board of Review.

The statutory scheme for examination at Patuxent Institution is unique among the statutes in this country for evaluating individuals who are not legally insane, but possess a character defect which propels them into criminal activity. "Any such examination shall be made by at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist." Article 31B, § 7(a).

"The institutional medical team, in examining any individual properly referred to it, employs recognized psychiatric techniques, including among other things, a psychiatric interview and evaluation in depth, a full battery of psychological tests, full sociological and social work studies, including electroencephalographic studies, review of past history and records, including police, juvenile, penal and hospital records, and, in addition, personal interviews with the accused's family, when feasible, and with the accused, are held. *These procedures are the accepted practice in matters involving psychiatric evaluation and the techniques employed in state and private mental hospitals, as well as by private physicians, all of which are essential to any accurate psychiatric diagnosis.*" *Director v. Daniels, supra*, 243 Md. at 57 (Emphasis supplied)

All other statutes, State and Federal, requiring evaluation, as above, do not contain the statutory requisites found in Article 31B to insure a comprehensive medical diagnosis, nor do they contain the safeguards available in Article 31B. The following is a list of jurisdictions having "sexual psychopath" statutes or statutes similar to Article 31B, and the evaluation requirements thereof:

Jurisdiction	*Statute*	*Evaluation Requirements*
1. United States	Title 18, §§4241,4247	Initially examined by (1) a medical officer appointed by the Warden, (2) a medical officer appointed by the Attorney General, (3) a competent expert in mental diseases appointed by the Surgeon General of the Public Health Service; under some circumstances by a psychiatrist designated by the court and a psychiatrist selected by the prisoner.
	Title 18, §3413 (Narcotic Addict Treatment Statute)	Two physicians, one of whom must be a psychiatrist.

Jurisdiction	*Statute*	*Evaluation Requirements*
2. Alabama	Ala. Code, Title 15, §437	Two qualified psychiatrists whose practice is exclusively limited to diagnosis and treatment of mental disorders.
3. California	Cal. Welfare and Inst'ns. Code, §6307	Two or three psychiatrists whose practice has been directed to diagnosis and treatment of mental and nervous disorders for not less than five years.
4. Colorado	Col. Rev. Stat. Ann. §39–19–2	Psychiatrists from the Colorado Psychopathic Hospital or as appointed by the court.
5. District of Columbia	D.C. Code Ann., §22–3506	Two qualified psychiatrists.
6. Florida	Fla. Stat. Ann., §917.17	Two or three qualified psychiatrists with five years' experience in mental and nervous disorders.
7. Illinois	Ill. Ann. Stat., Ch. 38–105–4	Two psychiatrists.
8. Iowa	Iowa Code Ann., §225A.4	Medical examination may be required.
9. Kansas	Kan. Gen. Stat. Ann. §62–1535–36	Mental examination and report by a psychiatrist at a state hospital.
10. Massachusetts	Mass. Ann. Laws, Ch. 123A–4	Two psychiatrists.
11. Minnesota	Minn. Stat., §2634	Two duly licensed doctors of medicine.
12. Missouri	Mo. Ann. Stat., §202.20	Two qualified physicians.
13. Nebraska	Neb. Rev. Stat., §29–2902	Two licensed physicians with two years training in mental diseases.
14. New Hampshire	N.H. Rev. Stat. Ann. §173–A :3	Referred to New Hampshire hospital for evaluation.
15. New Jersey	N.J. Stat. Ann., §2A :164–3	Referred to New Jersey Diagnostic Center.
16. Ohio	Ohio Rev. Code Ann. §2947.25	Referred to the psychopathic clinic or three psychiatrists.
17. Pennsylvania	Pa. Stat. Ann. Tit. 19, §1167, 1169	Examination by facilities of the Department of Welfare or by a psychiatrist whose report must be accepted by the Department.

Jurisdiction	*Statute*	*Evaluation Requirements*
18. South Dakota	S.D. Cod. Laws, §22–22–9	Referred to the South Dakota State Hospital.
19. Tennessee	Tenn. Code Ann., §33–1303	Examination by a psychiatrist or psychiatrists from the Department of Mental Health.
20. Utah	Utah Code Ann., §77–49–2	Two or more competent and reputable physicians recognized as specialists and experts in the field of psychiatry.
21. Vermont	Vt. Stat. Ann. Tit. 18, §8504	Adequate psychiatric examination.
22. Virginia	Va. Code Ann., §53–278–3	Referred to the Department of Mental Hygiene.
23. Washington	Rev. Code Wash. Ann., § 71.06.040	Initially examined by two duly licensed physicians, and if reasonable grounds to believe that the individual comes within the statute, then to the state hospital for examination.
24. Wyoming	Wyo. Comp. Stat. Ann., §7–349	Two qualified physicians (or one if only one available); one to be a psychiatrist, if possible.

The unique feature of Article 31B, which requires the tripartite examination, sets the Act apart from all other similar statutes. The foregoing compilation of statutes clearly illustrates the thoroughness with which Article 31B was drafted by incorporating the combined skills of three closely related disciplines. On this point, Dr. Manfred S. Guttmacher, whose lengthy qualifications are fully set forth in *Director v. Daniels*, *supra*, 243 Md. at 66, stated that:

> "I think you need a full psychiatric examination, you need full sociological and social work study. I think you need a full battery of psychological tests, and I think it is very helpful to have an individual under a more prolonged surveillance such as you would have in a hospital or an institution like Patuxent where you can get observations as to his day to day behavior and

how he adjusts or maladjusts with his peers" (J.A. Md. 173).

Dr. Harold M. Boslow, Director of Patuxent Institution, testified before the United States District Court for the District of Maryland in *Sas v. Maryland*, 295 F. Supp. 389 (D. Md. 1969) that in order for a psychiatrist to make a diagnosis under Article 31B, §5, a personal examination of the patient is necessary.

> "(The Court) You would not feel that a paper record — suppose that you had the reliable records with respect to previous institutionalization, and that you had data of, again reliable, his conduct on the outside, and that over a period, let's say, of two years you, and by you I mean the staff, the man being there, sees him, sees what he does, how he acts and so on, would that, or would it not, of itself be enough to satisfy you that you could make a diagnosis?
>
> "(The Witness) No, sir, I would feel that I could not make an adequate professional judgment on that basis. . . . *no sir, because it would be unfair to both the patient and the man giving the opinion.* The patient might be psychotic, for all you know, and you would not be able to evaluate this without an interview. . . .
>
> "(The Court) Because it might be something more than defective delinquency; it might be an actual psychosis?
>
> "(The Witness) Yes, sir." (J.A. 4, 311-313) [Emphasis supplied.]

Respondent respectfully submits that the paucity of the record below has forced Petitioner and Respondent to rely on testimony not properly in the record in this case, but in order to assist this Court in evaluating the issues, Respondent has included in this Brief affidavits from the Director of Patuxent Institution, the Chief Psychiatrist and Chief Psychologist at Patuxent Institution explaining the

necessity for personal interviews by the psychiatrist and psychologist who make the evaluation required by law at Patuxent Institution. The affidavit of Dr. Giovanni Croce, Associate Director of Patuxent Institution, in Appendix A of this Brief, which is found at page 1a, Chief of the Psychiatric Department of Patuxent Institution, clearly evidences the difficulty in arriving at a *valid* diagnosis of defective delinquency without a personal interview. Also, Dr. Manfred Guttmacher testified in *Director v. Daniels*, *supra*, that:

> "Well, we have very few objective tests in our field. The same thing is true, of course, in the commitability to a hospital. If the patient remains completely silent you would have great difficulty in making a diagnosis. You would have to have a long period of surveillance to be able to arrive at a diagnosis. It is what the patient says, and what the patient does and the doing is very important as well as the saying" (J.A. Md., 258).

Although it is possible in certain instances for a psychiatrist to make a diagnosis when the individual refuses to cooperate in the diagnostic procedure, the validity of such a diagnosis might be questionable, and the necessity for the same is clearly shown in the affidavit in Appendix A, which appears at page 1a. Article 31B sets forth meticulous standards and procedures to be followed in order to provide greater protection to the individual being diagnosed. Respondent and the staff at Patuxent Institution use their best efforts in order to assure that any examination is as valid as possible under current medical standards.

The area completely ignored by Petitioner in his Brief is the statutory requirement that a full psychological examination be given and diagnosis made by qualified psychologists. "Then a battery of psychological tests is given.

This is given routinely. This is required by law contradistinction to the mental hospital system, where they are only done on a selected basis" (J.A. Md., 621). This clearly points to the draftsmen's overriding interest in obtaining a valid diagnosis of defective delinquency. A psychologist would find it impossible to make a valid diagnosis without the benefit of the tests which he personally administers. The necessity for his testing and the reasons for the use of each test are fully set forth in the affidavit of Dr. Sigmund Manne, Chief Psychologist at Patuxent Institution, in Appendix B of this Brief, which appears at page 4a. Dr. Arthur Kandel, Associate Director of Patuxent Institution, testified in *Director v. Daniels, supra,* that he would not, as the examining psychologist, render an opinion on whether or not an individual was a defective delinquent without personally interviewing the patient himself. He stated that he could not rely on the tests of others unless he knew that the tests were valid, but in no event would he give a recommendation as to defective delinquency without a personal interview of the patient (J.A. Md., 224-226, 272-274). The essence of his testimony was that a determination based on tests and data received from other psychologists would lack the proper validity unless all the information comprising the tests were before him, and he had a chance to personally interview the patient. The necessity for psychological evaluation as part of a valid diagnosis was clearly pointed out in "Research Report No. 29," *supra,* where the doctors responsible for the medical aspects of the report stated that the stage of development had been reached where psychological and psychiatric diagnosis of those sent for evaluation could be validly ascertained. "Medical authorities emphasize what they consider to be the failure of our criminal law to take into account proven achievements of our psychologists and psychiatrists." "Research Report No. 29," *supra,* at page 7.

Following a patient's arrival at Patuxent Institution for evaluation, he is seen by members of the Classification and Social Service Departments and is informed about the rules and regulations of the institution, the proposed examinations, and the use to be made of the same. He receives a complete physical examination, including an electroencephalogram, in order to determine any organic basis for possible mental aberrations. The Classification Department sends out its requests to the patient's schools, employers, hospitals, penal institutions, parole authorities and the Federal Bureau of Investigation, in order to obtain as much background data on the patient as is possible. The Social Service Department obtains a social history of the patient and his family, when possible. Within 45 to 60 days, the patient is seen by the psychiatrist and psychologist assigned to him, and the tests necessary for a valid determination as to whether or not the patient is a defective delinquent are made. The report to the court is usually made within 90 days following the patient's admission to Patuxent Institution (J.A. Md., 621, 669); (J.A. 4, 200-202, 270). The report must be made to the court within six months of the patient's arrival at Patuxent Institution. Article 31B, §7(a).

Subsequent to the examination, the individual is "staffed". He appears before a staff meeting consisting of all the professional persons available at that particular time, whose number ranges from 6 to 14 persons, but always includes each individual who personally examined the patient. All of the test protocols are evaluated, and each examining member presents his findings. The patient is brought in, and the staff has the opportunity to personally examine him and go over the reports with him. When the patient leaves, the staff discusses and decides on its recommendation. Every professional member at the staff

meeting votes, and a majority of those present and a majority of the examining professionals is necessary before a recommendation that the individual be committed as a defective delinquent is made.

Following commitment to Patuxent Institution as a defective delinquent, the individual enters the treatment program which is designed ". . . to develop internal controls within the individual in order that he may learn sufficient restraint to become a useful member of society. Otherwise stated, such aim is to enable defective delinquents, through treatment, to control their tensions, and more specifically to help the individual gain insight into his behavior, to accept responsibility for himself and others, to adjust with relationship to his peers and authority figures, to tolerate frustration and postpone gratification of instinctional demands." *Director v. Daniels, supra,* 243 Md. at 58. Treatment at Patuxent Institution consists of a total therapeutic program incorporating psychotherapeutic, educational, religious and recreation programs and a highly structured social system and therapeutic milieu. A graded-tier system with tier counseling was evolved to reward socially desirable behavior.

Patuxent Institution has magnified and intensified its therapy through the creation of Unit Treatment Teams which allow patients continuing therapy within the group (J.A. 4, 179-180, 183-185). Patuxent Institution also provides holiday and leave status, innovative vocational rehabilitation, speech therapy, and work release programs. A halfway house located in Baltimore City provides meaningful psychiatric after-care to parolees with daily therapy and counseling programs and the presence of a full time staff member living on the premises. After-care for those not in the Baltimore City area is provided by the staff in other parts of the state (J.A. 4, 174-178, 318).

Recent additions to Patuxent's physical structure include a new school building, chapel, additional shop space and the aforementioned halfway house, located in Baltimore City. Patuxent Institution's per capita budget is $7,994.00 for fiscal 1971 as compared with the following:

1. Maryland Penitentiary — $4,209.00
2. House of Correction — $3,592.00
3. Maryland Correctional Institution — Hagerstown — $3,931.00
4. Correctional Camp System — $2,438.00
5. Central Laundry — $2,103.00

Patuxent Institution is currently budgeted for the following positions directly related to the welfare of the patients:

1. Psychiatrists — 10
2. Psychologists — 11
3. Social Workers — 17
4. Educational Personnel — 9
5. Vocational Personnel — 11
6. Recreational Personnel — 4
7. Medical Personnel — 12
8. Classification Personnel — 6
9. Dietary — 9

This personnel is available for the current population at Patuxent Institution which consists of 316 committed patients and 176 patients in diagnosis.

Edward Lee McNeil

Petitioner was indicted for the crimes of attempted rape (Indictment No. 2392/1966), assault (Indictment No. 2393/1966) and assault (Indictment No. 2394/1966) and was arraigned in the Criminal Court of Baltimore on June 1, 1966, where Petitioner entered a plea of not guilty to all three indictments. Subsequently, on July 12, 1966, he was tried in the Criminal Court of Baltimore by Judge J. Harold Grady, without a jury.

The complaining witness under the attempted rape indictment, Ruby Berry, testified that Petitioner grabbed her around the neck, dragged her into an alley and attempted to rape her. She positively identified Petitioner as her assailant (J.A. 3-4). Jerome Johnson, the arresting police officer, testified that at 2:21 A.M., on May 1, 1966, he was patrolling in the vicinity of 22nd and St. Paul Streets in Baltimore, Maryland, when he heard a woman screaming for help. He extinguished the headlights on his patrol car and proceeded north on Hargrove Street when he observed a male running towards the car. When apprehended, Petitioner's clothes were disarranged and his trousers were unzipped in the front. Petitioner struck Officer Johnson's partner, and Officer Johnson chased Petitioner several blocks where he was subdued (J.A. 26-27). An independent witness, Jack Moore, testified that he observed a struggle between a police officer and Petitioner and assisted the officer in physically subduing the Petitioner (J.A. 10-11). Mr. Moore stated that after Petitioner was subdued, he kept repeating "No, Lord, no; not again . . . I didn't hurt that woman" (J.A. 12).

Petitioner testified denying any implication in the crime, but stated on direct examination that he had received probation before verdict on prior charges of assault and rape

and assault and battery (J.A. 17). The court found Petitioner guilty of attempted rape under Indictment No. 2392/1966 and assault under Indictment No. 2393/1966.

The court, having before it testimony involving Petitioner in an attempted rape, two assaults, and prior adjudications of assault and rape and assault and battery, referred Petitioner to the Medical Department of the Supreme Bench of Baltimore City for a psychiatric evaluation in order to gain additional information for disposition.

The report of the Medical Officer in his summary and recommendation revealed the following:

> "The psychological examination reveals an intelligence level within the average range, full scale I.Q. of 104. It also indicated impulsiveness and vulnerability to anxiety followed by acting out. This acting out could follow his fantasy preoccupations which have to do with women, blood, high heel shoes and thighs.
>
> "There is no evidence of psychosis and the patient must be considered responsible under the Maryland Law, for his behavior. It is difficult to assign a diagnosis to this young man; he is not antisocial in the sense that he uses society as an enemy to be attacked. His unstable character structure does not permit adequate control when under stress and we do not know enough about his social life or lack of it. I would suggest a diagnosis of personality pattern disturbance, schizoid type, which would encompass his vulnerability to stress. This young man is certainly a danger to society and the rigidity of his defenses which do not permit a consideration of his offense, even after he had been found guilty, can be taken as a pessimistic sign that further offenses may occur.
>
> "In view of the above, I recommend that the Patient be considered for evaluation and treatment as Patuxent Institution." *McNeil v. State*, No. 204, Init. Term, 1967, Court of Special Appeals of Maryland, pages 14-18.

At sentencing, the court with Petitioner's prior record of antisocial behavior and the pre-sentence Medical Report from the Medical Department of the Supreme Bench of Baltimore City before it, sentenced Petitioner to five years imprisonment under Indictment No. 2392/1966 and to one year imprisonment under Indictment No. 2393/1966, the sentences to run concurrently. The court then further referred Petitioner to Patuxent Institution for evaluation and determination as to his status as a defective delinquent (J.A. 33).

Petitioner was received at Patuxent Institution on August 10, 1966, for evaluation as to his status as a defective delinquent. On August 29, 1966, Petitioner appealed his criminal conviction to the Court of Special Appeals of Maryland which denied relief in an unreported *per curiam* decision filed July 21, 1967. *McNeil v. State*, Init. Term, 1967, No. 204. The mandate of the Court of Special Appeals of Maryland was docketed in the Criminal Court of Baltimore on August 22, 1967. Petitioner subsequently filed in the Court of Appeals of Maryland a Petition for Writ of Certiorari to the Court of Special Appeals of Maryland, which was denied by the Court of Appeals of Maryland on November 6, 1967.

On September 28, 1967, Petitioner filed his first petition under the Uniform Post Conviction Procedure Act, Article 27, §645(a) *et seq.*, Annotated Code of Maryland, which was denied on June 28, 1968, by Judge Thomas J. Kenney in the Criminal Court of Baltimore. An application for leave to appeal to the Court of Special Appeals of Maryland was denied on November 21, 1968. Petitioner subsequently filed his second petition under the Uniform Post Conviction Procedure Act, *supra*, on January 23, 1970, and relief was denied by Judge Basil A. Thomas in the Criminal

Court of Baltimore on August 17, 1970. An application for leave to appeal to the Court of Special Appeals of Maryland was denied on April 26, 1971. Petitioner's third petition under the Uniform Post Conviction Procedure Act, *supra*, was filed on January 18, 1971, and relief was denied on June 9, 1971, by Judge Robert B. Watts of the Criminal Court of Baltimore. Petitioner has similarly filed four petitions for the issuance of the Writ of Habeas Corpus in the United States District Court for the District of Maryland, which petitions were denied. Petitioner also filed three petitions for the Writ of Habeas Corpus in Montgomery County, Maryland, Baltimore County, Maryland, and Baltimore City, Maryland, which were similarly denied.

Petitioner's adjustment at Patuxent Institution, even in those areas where it would be beneficial to him, has been poor. He has refused on 18 occasions to participate in the evaluation procedures and also has refused to participate in any of the other available programs.

Date	*Patuxent Official*	*Reasons*
1. 9/16/66	Mr. Simms Social Worker	Refused to cooperate in social history interview. Petitioner stated that his appeal was pending.
*2. 9/19/66		Refused to go to school.
*3. 9/21/66		Refused to go to school. Petitioner stated he wanted to be dropped from the school list.
4. 9/27/66	Mr. Wimmer	Petitioner refused to become involved in the California Achievement Testing Program.
5. 10/8/66	Mr. Florenzo	Refused psychological examination. Petitioner gave no reason, and refused to leave his tier.
6. 10/11/66		Refused to attend staff.
7. 10/29/66	Dr. Cantrell	Refused to appear for psychiatric examination.
8. 12/12/66	Mr. Simms	Refused to discuss social history.
9. 11/6/68	Dr. Meiller	Petitioner refused psychiatric examination "on advice of my lawyer."
10. 7/25/69	Dr. Meiller	Refused psychiatric examination. No reason given.

* Formal non-cooperation unrelated to evaluation.

Date	*Patuxent Official*	*Reasons*
11. 6/9/70	Dr. Klark	Refused psychiatric examination. "I don't want to talk to you, you can go and talk to my lawyer!"
12. 6/16/70	Mr. Florenzo	Refused psychological examination. Petitioner stated "I have to think about it. I can't make a final decision right now."
13. 8/10/70	Dr. Klark	Refused psychiatric examination.
14. 8/19/70	Dr. Klark	Refused psychiatric examination. Petitioner stated "I have nothing to say."
15. 10/22/70	Dr. Klark	Refused psychiatric examination. Petitioner stated "I don't want to talk to you and to no doctor!"
16. 3/2/71	Dr. Klark	Refused psychiatric examination.
17. 9/30/71	Dr. Tasony	Refused psychiatric examination. Petitioner stated that he was not ready as yet, but may cooperate within a few months.
18. 10/4/71	Mr. Florenzo	Refused psychological examination. Petitioner stated that he had court litigation pending and was waiting for the determination.
19. 2/10/72	Dr. Tasony	Refused psychiatric examination. Petitioner informed Dr. Tasony that he had informed them about his refusal and became extremely angry and hostile.
20. 2/14/72	Mr. Florenzo	Refused psychological examination. Petitioner stated "The answer is still the same. Pending advice of counsel, I have nothing to say."

Petitioner's statement in his Brief that the first three attempts to examine him while his direct appeal was pending overlooks the statutory language of Article 31B, §7(a), which requires the report to be made to the court within six months of the arrival of the patient at Patuxent Institution. Petitioner further complains about a letter sent to Judge Albert L. Sklar of the Criminal Court of Baltimore dated May 23, 1967, indicating why Petitioner had not been diagnosed as required by Article 31B, §7(a). This is done routinely at Patuxent Institution when a diagnosis runs beyond the statutory period in order to so inform the court and was not sent in response to Petitioner's letter to the United States District Court for the District of Maryland at or about the same time.

The lapse of time between the fourth recorded formal request for examination was necessitated by Petitioner's persistent refusal to see his examining doctors. When such a situation occurs at Patuxent Institution, informal contacts with the patient are made periodically to see whether he is willing to cooperate in the examination. When the informal method produces no results, Patuxent Institution resorts to its more formal method of contacting and requiring the patient to appear before the doctor and announce verbally that he does not wish to be examined. This is done in order to obviate criticism from other courts that Patuxent Institution makes no effort to diagnosis its recalcitrants.

Petitioner's statement that he "would have been released over four years ago if he had been confined at the Maryland Correctional Institution in Hagerstown and served the minimum time provided by law with respect to his sentence . . ." is inexact. Parole is not a matter of right, nor is it automatic, and as Article 41, §122, Annotated Code of Maryland, only sets forth the minimum time in which one is eligible for parole, this statement is pure conjecture and intimates that Petitioner has adjusted properly within the institutional setting. Among other things, Petitioner was disciplined at Patuxent Institution for possession of a weapon on February 12, 1967; disrepect to an officer on August 16, 1967, when Petitioner threatened to "knock the hell out of" the officer; and fighting on August 8, 1968. These three infractions occurring early in Petitioner's stay at Patuxent Institution would, more than likely, have destroyed any chance that Petitioner had for parole if he had been confined at the Hagerstown Correctional Institution.

The total amount of information contained in Petitioner's file at Patuxent Institution is short social history, a record of his prior offenses, including an assault, for which he was

detained in the Maryland Children's Center for 30 days in 1960, as a juvenile, and convictions of robbery and rape for which he received probation before verdict in December, 1965, in the Criminal Court of Baltimore. Petitioner spoke briefly with Dr. Tasony, a psychiatrist at Patuxent Institution, on September 5, 1966, but thereafter refused any cooperation. The file also contains the report of the Medical Officer of the Supreme Bench of Baltimore City dated July 19, 1966, and a brief report from the Maryland's Children Center directed to Judge Charles E. Moylan, of the Supreme Bench of Baltimore City, sitting as a Juvenile Court Judge, following Petitioner's referral to the Children's Center after the finding of delinquency for assault. As evidenced by the Affidavit attached hereto as Appendix C of Respondent's Brief, at page 15a, a diagnosis under Article 31B, §7(a) on the basis of this material would be invalid.

Statistical Data

Petitioner, throughout his Brief, raises the spectre of a life sentence under Article 31B. Patuxent Institution began operating in 1955, and there is no one at Patuxent Institution who has been there since 1955 and who has not had at least one opportunity to be free on parole. The only exception is an individual transferred to a mental hospital who escaped from that hospital and was at large for 10 years. Patuxent Institution is not a life sentence, and experience dictates to the contrary. The median sentence of those committed to Patuxent Institution is 10 years. The first quartile ranking is 5 years; the third quartile ranking is 18 years; and the fourth quartile range is 20 years or more. Of the 380 committed patients on first parole from Patuxent Institution, the median stay prior to parole is 5 years, the first quartile ranking is 3 years, the third quartile ranking is 7 years; and the fourth quartile range is 1 year,

6 months to 14 years, 5 months. This includes all time spent by the individual under his original criminal conviction prior to the time he was transferred to Patuxent Institution for evaluation.

Patuxent Institution's figures show that on April 3, 1972, of 176 men in diagnosis, 9 are beyond their original criminal sentences and have not been diagnosed because they have refused to cooperate with the evaluation procedure. Four patients of the 176 are beyond the expiration of their sentence, but have been diagnosed and are awaiting the judicial hearing to determine whether they are defective delinquents.

From about 1965 until recently, there was always a group of approximately 25 individuals in diagnosis who refused to be examined. They were generally not the same individuals, but the number in the group was fairly consistent. Recently, the number of those refusing to be evaluated has increased and as of April 3, 1972, 72 of the 176 men in diagnosis have refused to be evaluated.

Miscellaneous

Petitioner's insistent complaint throughout his Brief is that he received no treatment at Patuxent Institution. Petitioner's Brief, pages 15 and 23. What Petitioner fails to state is that it is impossible to treat an individual until determination of the cause of the ailment is made. In Petitioner's case, he has refused to allow the staff to determine whether, in fact, he is a defective delinquent in order that treatment might be provided. Further, Petitioner has made every effort to deny himself any of the opportunities available at Patuxent Institution, including his refusal to attend the school program.

Petitioner's reference at page 25 of his Brief in footnote 30, to the Wechsler-Bellevue Intelligence Test, the

Rorschach Inkblot Test and the Draw-A-Person test are typical examples of the necessity of a personal interview. Without a personal interview, the administration of these tests would obviously be impossible, and the same are necessary for valid diagnosis by a psychiatrist.

Petitioner's reference at page 47 of his Brief in footnote 54, that ". . . unless the inmate periodically returns to a staff member and personally informs him that the inmate refuses to answer questions, the inmate is disciplined," is a misstatement of what happens. Petitioner is not disciplined for failing to take the examination, but if he refuses to personally see the examiner, he may be disciplined for failure to obey an order of an institutional staff member. *Sas, supra*, 295 F. Supp. at 410-411; (J.A. 4, 217-223).

Further, Petitioner states at page 48 of his Brief in footnote 56 that *Sas v. Maryland, supra*, 334 F. 2d 506, found that the primary purpose of Article 31B was not to provide treatment. That case was decided on June 16, 1964. Although early writings indicated that there was some understaffing at Patuxent, the testimony before the courts in *Murel, supra*, showed that Patuxent is now adequately staffed (J.A. Md., 814-840, 884-891); (J.A. 4, 212).

The findings of the courts subsequent to *Sas, supra*, have held that therapy is available to all at Patuxent Institution and that confinement without treatment would be patently unconstitutional. *Director v. Daniels, supra*, 243 Md. at 60-61; *Sas, supra*, 295 F. Supp. at 416; *Tippett, supra*, 436 F. 2d at 1155; (J.A. 4, 293).[4]

---

[4] "(Judge Powers) From what you know of it [treatment at Patuxent Institution], do you approve or disapprove?

"(The Witness) I heartily approve. I wish we had an institution like this in our state. We have a diagnostic center, but after we have made the diagnosis we haven't got a place like this for treat-

SUMMARY OF ARGUMENT

With craftsmanship and care, Article 31B (Defective Delinquents) was established with the goals of avoiding both the harsh over-inclusiveness of those habitual criminal statutes by which non-dangerous prior offenders are subject to its provisions and the rigid under-inclusiveness of such statutes by which dangerous first offenders are exempt from its provisions and hence immune from the State's interest in curing recidivism by treatment.

To implement this design, a careful process of examination and evaluation of referred individuals who had been tried, convicted, and sentenced for specified crimes was established. The linch-pin of this process is the input from the inmate in the form of personal history, social history, psychological tests, his version of the offense in question, and psychiatric interviewing.

On eighteen separate occasions Petitioner McNeil has refused to allow psychiatric examination, psychological testing, or the taking of his social history, thus starving the diagnostic process of cooperative input. Why does he refuse?

The claim of a risk of criminal incrimination ignores the legislative, judicial, and administrative safeguards which have been established to protect him from future criminal incrimination. In seventeen years of operation,

---

ment. I mean the patient's course of life will depend upon his response to treatment. We do not have a place like that, I wish we did" (J.A. Md., 288-289).

This evaluation of Patuxent's treatment program came from Dr. Karl A. Menninger, Chief of Staff of the Menninger Foundation; Member of the National Advisory Council of the American Civil Liberties Union, advisor to the Director of the Kansas State Hospital and Penal Institutions; advisory member for the model sentencing act; psychiatric advisor to the United States Air Force and Strategic Air Command. *Director v. Daniels, supra,* at 67.

there has been no concrete instance known by Respondent where Patuxent records have found their way into either criminal investigation or adjudication.

The claim of a risk of civil commitment based upon a diagnosis made from patient input ignores the twin-fold necessity confronting the State of Maryland: (1) the necessity to commit and treat dangerous anti-social individuals, and (2) the necessity to diagnose in order to treat. Why does the State of Maryland insist upon cooperatively given input as a basis for its diagnosis?

There is a superabundant basis in fact affirming the State's carefully considered conclusion that without inmate cooperation in its varied forms, no valid diagnosis is possible, and that other means of diagnosis and/or commitment are less fair and less effective.

The State's right to compel cooperation is based upon the State's need for diagnosis. If the State has a right, it cannot be without a means of vindicating it. The means chosen — an indeterminate stay in the diagnostic area of Patuxent until cooperation is obtained — is a necessary and proper means to defeat the desire of undiagnosed defective delinquents to evade treatment by sitting out their sentences.

Thus, although the Maryland statute recognizes and protects the right of those referred for examination to challenge their status as defective delinquents before that status is finalized, a full-scale adversary judicial hearing prior to a referral for examination would be vexatious and purposeless, since the hearing would be to determine the probability of a fact (defective delinquency) unascertainable without the examination.

A balancing of an inmate's rights and the State's compelling interests are not to be seen as a "simplicity" (see

Petitioner's Brief, p. 15), but rather should be subjected to a concerned diagnosis by this Court.

ARGUMENT

I.

AN INDIVIDUAL TRIED, CONVICTED, AND SENTENCED FOR A PARTICULAR CATEGORY OF CRIMES AND THEN REFERRED BY COURT ORDER TO PATUXENT FOR EVALUATION IS NOT THEREBY DENIED DUE PROCESS NOR DOES HE POSSESS A RIGHT TO REMAIN SILENT OR A RIGHT TO REFUSE TO COOPERATE WITH PROFESSIONAL STAFF SEEKING AN EVALUATION OF HIS MENTAL CONDITION.

In *Murel v. Baltimore City Criminal Court*,[5] No. 70-5276, argued in this Court on March 28-29, 1972, the situation of individuals civilly committed to Patuxent Institution was presented and considered. In *Murel*, the bulk of argument was directed at the procedure used to determine the defective delinquency of a given patient (*see Murel* Brief for Petitioner's Arguments II, IV, V, VI, VII, VIII, IX, X, XII). In the present case, Petitioner is one of approximately seventy inmates at Patuxent Institution who have, by their non-cooperation, not allowed the fact-finding procedures attacked in *Murel* to operate at all.

In *Director v. Daniels*, 243 Md. 16, 43, 221 A. 2d 397 (1966), *cert. denied sub nom.; Avey v. Boslow*, 385 U.S. 940 (1966), the Court of Appeals of Maryland stated:

> "The procedural requirements of the Act include these safeguards to the defendant:
>
> "1. He must be convicted and sentenced in a Maryland Court for a crime.
>
> "2. The crime must be of a particular category: (a) a felony or (b) a misdemeanor punishable by imprisonment in the penitentiary or (c) one of vio-

[5] *Sas v. Maryland*, 295 F. Supp. 389 (D. Md. 1969), *aff'd sub nom.; Tippett v. Maryland*, 436 F. 2d 1153 (4th Cir.), *cert. granted sub nom.; Murel v. Baltimore City Criminal Court*, 404 U.S. 999 (1971).

lence, or (d) a sex crime involving physical force, disparity of age, or of an uncontrolled or repetitive nature, of (e) two or more convictions for offenses punishable by imprisonment in a criminal court of this State.

"3. There must be a request for examination by: (a) the Department of Correction, (b) the State's Attorney's office, (c) such person himself, (d) his attorney, or (e) the Court.

"4. The Court must order the examination.

"5. A copy of the order for examination must be served on the person to be examined.

"6. The person must still be confined.

"7. The examination must be made by at least three persons, one of whom must be (a) a medical physician, one a (b) psychiatrist and one a (c) psychologist.

"8. A majority of the examiners must conclude that the person is a defective delinquent.

"9. The person is entitled on request to be examined by a private psychiatrist of his own choice at the expense of the State unless he, himself, has asked for the original examination.

"10. The person must, after the examination with an affirmative result, be brought before the Court and advised of the substance of the report and the pendency of the hearing.

"11. He is entitled to counsel of his choice, or to competent counsel appointed by the Court.

"12. Counsel has access to all records, reports and papers of the institution relating to the person and to all papers in the possession of the Court bearing on his case.

"13. The person has a choice of a court or jury trial.

"14. He may make application for leave to appeal from the order holding him to be a defective delinquent, although such appeal does not lie as a matter of right.

"He, in addition to the specific statutory safeguards, has full opportunity to summon witnesses and to present evidence. Also, he has available to him all discovery procedure permitted under the Maryland Rules in civil cases, which is much broader than in criminal cases, including the taking of depositions, the use of interrogatories and demands for admission of facts.

"'. . . . An examination of the trial and hearing provisions of the Act can leave no doubt that it places around the accused more procedural safeguards than any of the Acts of a similar nature which have been upheld by the Courts against this attack.' *Sas v. Maryland, supra.* Also see *Minnesota, ex rel. Pearson v. Probate Court, supra* and *Buck v. Bell, supra.*" *Director v. Daniels, supra*, 243 Md. at 43-44.

For purposes of comparison, Petitioner Murel[6] completed all fourteen steps listed above, but Petitioner McNeil has not allowed step seven to be taken due to his refusal to be examined.

A. The Absence of an Adversary Judicial Hearing Prior to Referral to Patuxent for Examination Does Not Deny Due Process.

1. *There is no constitutional requirement for an adversary judicial hearing before referral to Patuxent for examination.*

Society has an overriding interest in protecting itself from the violent mentally ill. *Greenwood v. United States*, 350 U.S. 366 (1956). The validity of 18 U.S.C.A. §§ 4244-4248, which deals with the care and custody of insane persons charged with or convicted of offenses against the

[6] Petitioner Murel, in addition to challenging the fact-finding process, also challenged: (1) the definition of defective delinquency (*cf.* Argument I); (2) the treatment available at Patuxent Institution (*cf.* Arguments III and V); (3) the review and reevaluation process; and (4) the indeterminate sentence (*cf.* Argument II).

United States, was challenged in *Greenwood*. Mr. Justice Frankfurter, speaking for a unanimous Court, held 18 U.S.C.A. §§ 4244-4248 to be constitutional, after giving a resume of the salient features of the statute. Greenwood had not been brought to trial because of his mental condition, which was described as psychotic and incompetent. It was subsequently determined that the prognosis for his recovery was poor and that indefinite hospitalization to ensure his safety and that of society was in order. The petitioner was committed to the care of the Attorney General until his sanity should be restored or his mental condition so improved that if released he would not endanger the safety of the officers, property, or other interests of the United States.

The Court observed that the government's interest in protecting society as well as the prisoner was paramount and that constitutionally the government had the right and the power to have a prisoner whose term of imprisonment was about to expire indefinitely committed to an appropriate institution until his sanity or mental competence was restored and he was no longer a danger to the officers, property, or other interests of the United States. That right also applied in the case of Greenwood, who had not been brought to trial. As the Court said in *Greenwood, supra*, at 375-76:

> "The fact that at present there may be little likelihood of recovery does not defeat federal power to make this initial commitment of the petitioner. We cannot say that federal authority to prosecute has now been irretrievably frustrated. The record shows that two court-appointed psychiatrists found petitioner sane and competent for trial. While the District Court did not accept their conclusion, their testimony illustrates the uncertainty of diagnosis in this field and

> the tentativeness of professional judgment. The only certain thing that can be said about the present state of knowledge and therapy regarding mental disease is that science has not reached finality of judgment, even about a situation as unpromising as petitioner's, at least as indicated by the report of the United States Medical Center at Springfield. Certainly, denial of constitutional power of commitment to Congress in dealing with a situation like this ought not to rest on dogmatic adherence to one view or another on controversial psychiatric issues."

The thrust of this Court's decision in Greenwood is that since greater precision in the diagnosis of the mentally ill would be achieved with time, the law must not assume a dogmatic position on the validity of psychiatric theories, and that society had to rely on the learning of psychiatry in protecting it against those individuals who posed a danger to themselves and it. In subsequent decisions, there has been much judicial comment on society's need to protect itself against the sexual psychopath, the insane, or the mentally incompetent. *See e.g., Carter v. United States,* 283 F. 2d 200 (D.C. Cir. 1960). Indeed, under the federal scheme it has been held irrelevant that a person is committed as a danger to society before trial and remains committed beyond the possible maximum sentence of which he is charged. *Carmen v. Settle,* 209 F. Supp. 64 (W.D. Mo. 1962).

The impact of these understandings in the area of the defective delinquent and its ilk is that the formalistic confines of sentence and punishment are transcended, the frame of reference being the time necessary for adequate treatment, not the length of a sentence.

In *Baxstrom v. Herold,* 383 U.S. 107 (1966), this Court required that the petitioner be given the right to the same

procedure as all others civilly committed under § 74 of the New York Mental Hygiene Law, which provided that civilly committed individuals could *seek* review de novo on the question of their sanity. The question of review prior to initial commitment was not raised. However, in this Court's silent approval of the New York civil commitment procedure, there is a basis for concluding that no adversary judicial hearing prior to evaluation need be given.[7]

In *Lynch v. Overholser*, 369 U.S. 705, 711 (1962), this Court described the District of Columbia statute, stating, without disapproval:

> "Thus, a civil commitment must commence with the filing of a verified petition and supporting affidavits. DC Code § 21-310. This is followed by a preliminary examination by the staff of Saint Elizabeths Hospital, a hearing before the Commission on Mental Health, and then another hearing in the District Court, which must be before a jury if the person being committed demands one. DC Code § 21-311."

In *Caritativo v. California* U.S. 549 (1958), this Court held that due process is not denied when a state leaves to its governor to determine ex parte the sanity of a man condemned to death, affirming *Solesbee v. Balkcom*, 339 U.S. 9, 12 (1950), which relied upon the "inherent differences between trial procedures and post conviction procedures such as sentencing." *See also Williams v. New*

---

[7] In *Humphrey v. Cady*, ___ U.S. ___, 40 U.S.L.W. 4324 (Mar. 22, 1972), this Court found the need for habeas corpus evidentiary hearings on the question of petitioner's commitment under the Wisconsin Sex Crime Act, holding his claims not frivolous in light of *Baxstrom v. Herold, supra*. Petitioner's other cited cases (Petitioner's Brief, pp. 16-23), almost uniformly deal with the need for a hearing before the commitment of an individual is finalized and do not reach the issue here present, the need for a hearing before a referral for examination.

York, 337 U.S. 241 (1949); *Phyle v. Duffy*, 334 U.S. 431 (1948); *Nobles v. Georgia*, 168 U.S. 398, 405 (1897).

The additional restraints, if any, upon Petitioner's liberty are certainly no greater than an original arrest and incarceration or a civil insanity commitment,[8] neither of which requires an adversary judicial hearing prior to transfer. The only way that this restraint becomes significant is after the unnecessary non-cooperation by Petitioner. *Cf. People v. Lipscomb*, 263 Cal. App. 2d 59, 69 Cal. Rptr. 127 (1968).

In evaluating whether due process requires an adversary judicial hearing before a given decision, it is helpful to look at (a) the nature of the injury to the petitioner by the absence of a "trial-type" hearing, and (b) the governmental interest served by avoiding a "trial-type" hearing. *See Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886 (1961).

This Court in *Jennings v. Mahoney*, ... U.S. ....., 30 L. Ed. 2d 146 (1971), refused to strike down a statutory scheme whereby a state official, solely on the basis of accident reports and without affording the motorist a hearing on the issue of fault, could revoke his license, and noted:

> "The District Court in fact afforded this appellant such procedural due process. That court stayed the Director's suspension order pending completion of judicial review, and conducted a hearing at which appellant was afforded the opportunity to present evidence and cross-examine witnesses. Both appellant and the Director testified at that hearing. The testimony of the investigating police officer would also have been heard except that appellant's service of a

[8] It should be unnecessary to mention that the State of Maryland by means of Patuxent Institution has an obvious interest in centralizing diagnostic facilities in one place and bringing inmates to the place of referral rather than taking the diagnostic staff to the various correctional institutions.

subpoena upon him to appear was not timely under the applicable court rules." 30 L. Ed. 2d at 148.

The *Jennings* court dealt with the serious change of status by administrative action from driver to non-driver. In the instant case, the only change in status is a change in the *place* of incarceration.

2. *A pre-evaluation hearing prior to referral of an individual to Patuxent would be vexatious and purposeless.*

Where or not a hearing prior to referral of an inmate to Patuxent for evaluation is a due process requirement involves also an understanding of "the precise nature of the governmental function involved as well as the private interest that has been affected by governmental action." *Cafeteria & Restaurant Workers v. McElroy, supra.*

The governmental interest involved in avoiding an adversary judicial hearing before a referral is fairly apparent. In the present case, the information which prompted the trial judge's order of referral came from two sources: (1) Petitioner's trial resulting in a verdict of guilt on the charge of attempted rape and assault, and (2) the report of the Medical Department of the Supreme Bench of Baltimore City.

As to evidence adduced at trial, there is no reason for an additional adversary judicial hearing which would litigate the same facts found at trial. In fact, in many — if not most — referrals, the only evidence before the trial judge is the testimony as to guilt and the accused's past record, both sources of evidence having been the result of full-scale criminal trials.

As to the medical report, this Court has held that the trial judge at sentence determination is entitled to receive "additional out-of-court information to assist him" without having that information filtered through the advocacy process. *Williams v. New York, supra* at 252. To hold other-

wise would be to immobilize the dispositional process[9] without any assurance of greater fairness.

The probable cause requirement for a Patuxent referral is very similar in function to the probable cause requirement for a search or arrest warrant, neither of which requires a prior adversary hearing. In each case, speed and dispatch are necessary; the Patuxent referral requires dispatch because of the probable danger involved in even allowing the particular inmate to be at large in the general prison community, let alone the general community. In each case, common sense rather than fully-litigated factual findings are involved; the Patuxent referral is a form of lay recognition of the need for expert advice. *See Greenwood v. United States, supra;* cf. *McGautha v. California*, 402 U.S. 183 (1971) (recognizing that vague standards in discretionary dispositional processes after a full-scale criminal trial are not constitutionally defective).

On the basis of a review of the precise nature of the Patuxent referral, it is submitted that requiring an adversary judicial hearing to determine the existence of probable cause as to defective delinquency would be purposeless and vexatious.

B. The Privilege Against Self-Incrimination Does Not Apply to Non-Testimonial Disclosures at a Psychiatric Examination Pursuant to a Civil Proceeding Where There Is No Risk of Criminal Incrimination.

1. *Personal disclosures as to one's mental condition are not "testimony" as the term has been historically and is presently used.*

Petitioner's contention that an individual referred to Patuxent, in being required to cooperate, has his privilege

[9] Almost uniformly the cases cited by Petitioner deal with the need for a hearing before *finalization* of commitment, a proposition recognized in §8 of Art. 31B.

against self-incrimination abridged is implicitly rejected in the line of cases, which hold that a defendant need not be warned of his *Miranda* [*v. Arizona*, 384 U.S. 436 (1966)] rights prior to being examined by a government psychiatrist, *Ramer v. United States*, 411 F. 2d 30 (9th Cir. 1969), *cert. denied*, 396 U.S. 965 (1969). *See also State v. Risden*, 106 N.J. Super. 226, 254 A. 2d 812 (1969); *Franklin v. State*, 114 Ga. App. 304, 151 S.E. 2d 191 (1966) (medical examination).

In *United States v. Baird*, 414 F. 2d 700 (2d Cir. 1969), the defendant produced the testimony of a psychiatrist to the effect that he suffered from a combination of circulatory impairment in the brain with cerebral atrophy, reactive depression. The psychiatrist concluded that the defendant lacked substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the income tax laws. On the Government's motion, the trial court ordered the defendant "to cooperate fully with the examining psychiatrist and to answer each and every question put to him by the psychiatrist." The trial court added that "there is no privilege on the part of this defendant to decline to answer any question put to him by this examining psychiatrist." The trial court specifically limited the government psychiatrist's testimony to the issue of criminal responsibility and would not permit the repetition of anything bearing on the issue of guilt or innocence. On appeal, the Government relied on the so-called "pro tanto waiver" by the defendant of his Fifth Amendment rights, relying on *Pope v. United States*, 372 F. 2d 710, 721 (8th Cir. 1967) (en banc), *vacated and remanded on other grounds*, 392 U.S. 651 (1968); *Alexander v. United States*, 380 F. 2d 33, 39 (8th Cir. 1967); and *United States v. Albright*, 388 F. 2d 719, 722-24 (4th Cir. 1968). After distinguishing both *Pope* and *Alexander*, the Second Circuit said:

"We conclude, however, that where under such circumstances the defendant puts in evidence the opinion testimony of his expert, the Government has the right to have its expert examine the accused and to put in evidence his opinion testimony in rebuttal, and that the exercise of such right by the Government does not infringe the defendant's right against self-incrimination.

"These issues relating to the defense of insanity were before the Supreme Court of New Jersey in State v. Whitlow, 45 N.J. 3, 210 A. 2d 763 (1965). It said,

> " 'It is obvious, even to the layman, that in all probability a psychiatrist would require more than a mere physical examination of a defendant in order to reach a conclusion of his sanity or insanity. The very nature of the psychiatric study would seem to call for utterances or answers through conversation with the alleged incompetent. The psychiatric interview is the basic diagnostic tool.'
>
> * * * * * *
>
> " 'There seems to be a tendency elsewhere in insanity cases to allow the defense psychiatrist to recount the full history obtained from the defendant regardless of its hearsay or self-serving quality, so long as the doctor regards it as essential to the formulation of his expert opinion. If he so regards the history, the test of admissibility is satisfied. The thesis is that such conversations with and statements by the defendant, whether or not they relate to the crime itself, are verbal acts; circumstantial evidence for or against the claim of insanity. They do not come in as evidence of the truth of the facts asserted but rather, and only, as part of the means employed by the doctor in testing the accused's rationality, mental organization and coherence. They are object-like factors used to ascertain mental abnormality or the reverse.'
>
> 210 A. 2d 769-771.

"The statements which the defendant makes to the psychiatrist may be as vital for diagnosis as an x-ray or a blood test may be to a physician in another context; this was the theory of admissibility upon which appellant relied in having his expert witnesses recount otherwise inadmissible self-service, hearsay statements; and, even though they are verbal, they may be considered as 'real or physical evidence' rather than as 'communication' or 'testimony' within the meaning of Schmerber v. California, 384 U.S. 757, 763-764, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966) in which the Supreme Court said:

> " 'It is clear that the protection of the privilege reaches an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers. Boyd v. United States, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746. On the other hand, both federal and state courts have usually held that it offers no protection against compulsion to submit to fingerprinting, photographing, or measurements, to write or speak for identification, to appear in court, to stand, to assume a stance, to walk, or to make a particular gesture. The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling "communications" or "testimony," but that compulsion which makes a suspect or accused the source of "real or physical evidence" does not violate it.' (Footnote omitted.)

Schmerber did not make the communications — real evidence dichotomy absolute. While noting that 'this distinction is a helpful framework for analysis,' the Court foresaw that '[T]here will be many cases in which such a distinction is not readily drawn.' " *Baird, supra* at 708-09.

The Court also held in *Baird*, at 710, relying on *United States v. Driscoll*, 399 F. 2d 135, 139 (2d Cir. 1968); *Pope v.*

United States, supra; Alexander v. United States, supra; and *United States v. Albright, supra*, that the Federal District Court has the inherent power to order a psychiatric examination.[10]

In *Tippett v. Maryland*, 436 F. 2d 1153 (4th Cir. 1971), Judge Sobeloff in his concurring-in-part, dissenting-in-part opinion said:

> "The reluctance of Patuxent inmates to respond to the staff's probing is understandable. Admissions made concerning mental state and past criminal behavior provide significant evidence for the state to use at the judicial hearing on defective delinquency. The petitioners maintain that they have an absolute right to silence, and cannot be forced to reveal information which may be used against them. But determining defective delinquency involves essentially an inquiry into the state of the inmate's mind. Denied direct access, the state psychiatrists would be relegated to secondhand information in arriving at a diagnosis. In United States v. Albright, 388 F. 2d

---

[10] *Matthews v. Hardy*, 420 F. 2d 607 (D.C. Cir., 1969), *cert. denied*, 90 S. Ct. 1231 (1970), cited by Petitioner proves too much. *Matthews* stands for the proposition that after a mental examination by a psychiatrist the patient under D.C. Code §24-302 (1967) must be given a judicial hearing. This coincides with the provisions of Art. 31B §8 requiring a commitment hearing following examination. Unanswered by *Matthews* is the refusal of an individual in Matthews's position to submit to the initial mental examination (*compare* D.C. Code §22-3506 wherein a patient being examined as a possible sexual psychopath is required to answer questions asked by the psychiatrists under penalty of contempt of court). *See also* Fla. Stat. Ann. 917.17 (Supp. 1958), Ind. Ann. Stat. 9-3404 (now repealed) which contain language similar to that within Narcotics Civil Commitment Statute, 42 U.S.C. 3413 ("should he refuse to cooperate . . . he may be committed for additional confinement . . ."). *Compare* 18 U.S.C. 4241 (dealing with insanity occurring during confinement) where Respondent has uncovered no case where the Bureau of Prisons has been faced with a potentially mentally ill prisoner who refuses to cooperate in his psychiatric examination even with the possibility of indeterminate civil commitment.

719 (4th Cir. 1968), this court emphasized the necessity for a government psychiatric examination where the mental condition of a criminal defendant was in issue. It was reasoned that the defendant had waived his right to silence by raising the insanity issue as a defense, but the underlying thrust of the *Albright* opinion was the recognition that a reliable inquiry into the defendant's mental state is possible only with his active cooperation.

"With the continuing reservation that this issue is open to further consideration, I agree, for the present, that the right against self-incrimination cannot be rigidly applied in Patuxent proceeding. I rest, however, not on the asserted ground that the Act is 'civil' but that, because of the unusual nature of the necessary inquiries, the legitimate objectives of the legislation would be frustrated were inmates permitted to refuse cooperation. Granting the inmate the right to silence would in many instances thwart the personal examinations and interviews considered indispensable in determining whether the prisoner is or is not a defective delinquent." (Footnotes omitted.) 436 F. 2d at 1161-62.

It is now firmly established that "non-testimonial" evidence does not fall within the purview of the Fifth Amendment.

In *Breithaupt v. Abram*, 352 U.S. 432 (1957),[11] the petitioner claimed, *inter alia*, that his right against self-incrimination was violated when blood was extracted from him while he was unconscious. The blood sample was found to contain approximately .17 percent alcohol and the finding was introduced into evidence. The Court bypassed the application of Fourth and Fifth Amendment grounds raised. This Court decided the case by distinguish-

[11] *Breithaupt* predated *Mapp v. Ohio*, 367 U.S. 643 (1961).

ing it from *Rochin v. California*, 342 U.S. 165 (1952). However, the majority, through Mr. Justice Clark, said:

> "The test upheld here is not attacked on the ground of any basic deficiency or of injudicious application, but admittedly is a scientifically accurate method of detecting alcoholic content in the blood, thus furnishing an exact measure upon which to base a decision as to intoxication. Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous.
>
> "As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a property safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions." (Footnotes omitted.) 352 U.S. at 439-40.

The Respondent herein likewise contends that the examination to which Petitioner is required to submit is equally

as scientific and essential for the safety of the public as is a valid means of detecting blood alcohol in a drunken driver.

In *California v. Byers*, 402 U.S. 424 (1971), a case involving the requirement under California law that the driver of a motor vehicle involved in an accident stop and give his name and address, the respondent claimed that the divulgence of such information violated his Fifth Amendment right against self-incrimination. In his Opinion, Mr. Chief Justice Burger said:

> "The act of stopping is no more testimonial — indeed less so in some respects — than requiring a person in custody to stand or walk in a police lineup, to speak prescribed words, to give samples of handwriting, fingerprints or blood. United States v. Wade, 388 U.S. 218, 221-223, 18 L. Ed. 2d 1149, 1153-1155, 87 S. Ct. 1926 (1967); Schmerber v. California, 384 U.S. 757, 764 & n.8, 16 L. Ed. 2d 908, 916, 86 S. Ct. 1826 (1968); 8 Wigmore, Evidence § 2265, at 386-400 (McNaughton rev. 1961). Disclosure of name and address is an essentially neutral act. Whatever the collateral consequences of disclosing name and address, the statutory purpose is to implement the state police power to regulate use of motor vehicles." 402 U.S. at 431-32.

As mentioned in the foregoing discussion of society's need to be protected from the individual who poses a danger by being a defective delinquent, one is forced to reason that the logical thrust of *Byers* compels the view that the Fifth Amendment does not apply to examinations inquiring into a patient's mental state.

In 8 Wigmore, *Evidence*, § 2265, pp. 386-400 (McNaughton rev. 1961), the following was stated:

> *"Bodily condition (clothes, features, fingerprints, medical examination, etc.).* If an accused person were

to refuse to be removed from the jail to the courtroom for trial, claiming that he was privileged not to expose his features to the witnesses for identification, it is not difficult to conceive the judicial reception which would be given to such a claim. And yet no less a claim is the logical consequence of the argument that has been frequently offered and occasionally sanctioned in applying the privilege to proof of the bodily features of the accused.

"The limit of the privilege should be plain. From the general principle (§2263 *supra*) it results that an inspection of the bodily features by the tribunal or by witnesses does not violate the privilege because it does not call upon the accused as a witness — i.e., upon his testimonial responsibility. That he may in such cases be required sometimes to exercise muscular action — as when he is required to take off his shoes or roll up his sleeve — is immaterial, unless all bodily action were synonymous with testimonial utterance; for, as already observed (§2263 *supra*), not compulsion alone is the component idea of the privilege, but testimonial compulsion. What is obtained from the accused by such action is not testimony about his body, but his body itself (§1150 *supra*). Unless some attempt is made to secure a communication — written, oral or otherwise — upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one. Moreover, a practical consideration applies to this class of evidence. When the person's body, its marks and traits, itself is in issue, there is ordinarily no other or better evidence available for the prosecutor.

"Hence, the public interest in obtaining the evidence is usually sufficient to outweigh by a clear margin the private interests sacrificed in the process.

"Both principle and practical good sense forbid any larger interpretation of the privilege in this application.

"A great variety of concrete illustrations have been ruled upon. The following are the eleven principal categories. As for the first six, it should be easy to rule that they are not covered by the privilege. Cooperation of the person may or may not be demanded, but in any event exactly the same evidence could be obtained with no more than access to the person's passive body. And in no sense is the person required to disclose any knowledge.

". . . .

"(10) Requiring a suspect to submit to an examination for sanity."[12] (Footnote omitted.)

This view has been incorporated into the Uniform Rules of Evidence:

"*Uniform Rule of Evidence* 23(3) ('An accused in a criminal action has no privilege to refuse, when ordered by the judge, to submit his body to examination or to do any act in the presence of the judge or the trier of the fact, except to refuse to testify'); id. 25(b) ('no person has the privilege to refuse to submit to examination for the purpose of discovering or recording his corporal features and other identifying characteristics, or his physical or mental condition'); id. 25(c) ('no person has the privilege to refuse to furnish or permit the taking of samples of body fluids or substances for analysis'). These three rules are substantially the same as *Model Code of Evidence* Rules 201(2), 205(a) and 205(b) (1912), respectively."

Classifying a given disclosure, act, or utterance as "nontestimonial" has certain effects here pertinent. For example, it is now widely established that a defendant may be compelled, under the threat of being held in contempt of court, to submit to being placed in a lineup. *United*

[12] Wigmore sets out eleven categories of bodily conditions which are "non-testimonial," sanity examination being the tenth. Also set forth in the supplement to Wigmore is the quotation which follows from the *Uniform Rule of Evidence*.

States v. Hammond, 419 F. 2d 166 (4th Cir. 1969), *cert. denied*, 397 U.S. 1068 (1970).

Further support for the proposition that compulsory mental examinations do not violate the right against self-incrimination is found in cases dealing with the implementation of sexual psychopathy statutes. In the leading case, *People v. English*, 31 Ill. 2d 301, 201 N.E. 2d 455 (1964), it was held that refusal to answer questions posed by psychiatrists could result in a finding of wilful contempt. The Illinois court held that due to the nature of the proceeding, a defendant under the Sexually Dangerous Persons Act (Ill. Rev. Stat. 1963, Chap. 38, par. 105-1.01 to 105-12) could be compelled to answer the questions asked by the examining psychiatrists.[13] The Court in *English*, due to peculiarities present under Illinois law, held, however, that a defendant in such a proceeding could refuse to answer specific questions which would disclose criminal conduct inasmuch as those statements could be used in subsequent criminal prosecutions. The Court indicated that if the statements could not be later used to incriminate the defendant, he could be forced to answer questions concerning criminal conduct. As the Respondent stated in its brief in *Murel v. Baltimore City Criminal Court, supra*, it will not use any statement made by a patient at Patuxent against him in any subsequent criminal proceeding.[14] The

---

[13] Commitment for contempt of court based on a failure of a party to obey a valid order of court is civil in nature. Under such a situation the party in contempt may remain in prison until the order is complied with. As the court said in *In re Nevitt*, 117 F. 448, 451 (8th Cir. 1902) (quoted with approval in *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442 (1911)), "he carries the keys of his prison in his own pocket." *See also Zicarelli v. New Jersey State Com'n of Investigation*, 55 N.J. 249, 261 A. 2d 129 (1970), *cert. granted on other points*, 401 U.S. 933 (1971).

[14] No disclsoure by a patient at Patuxent Institution has been used in a subsequent criminal action in the Institution's seventeen-year existence (J.A. 4, 204.) *Murel v. Baltimore City Criminal Court, supra*, Brief of Respondents, p. 52.

problem posed to the Illinois court in *English*, therefore, does not exist in Maryland and full disclosure might be compelled in Maryland under the rationale of *English*.

In *State ex rel. Haskett v. Marion County Criminal Court*, 250 Ind. 229, 234 N.E. 2d 636 (1968), *cert. denied*, 393 U.S. 888 (1968), the Supreme Court of Indiana rejected the contention that compulsory examination of an accused in a sexual psychopathy action by two physicians violated the privilege against self-incrimination. Under Indiana statute, the accused was protected from the use of any of his statements in any future criminal proceeding against him. *See also Sevigny v. Burns*, 108 N.H. 95, 227 A. 2d 775 (1967); *State v. Madary*, 178 Neb. 383, 133 N.W. 2d 583 (1965); *Iowa ex rel. Fulton v. Scheetz*, 166 N.W. 2d 874 (1969).

The view of the courts on the nature and the complexities of the examination undertaken to determine mental illness and on criminal insanity has undergone a significant change in this century. Many of the earlier cases hold that no violation of the privilege against self-incrimination occurs because there was either no compulsion or the examination could be made without the defendant uttering a word. *People v. Krauser*, 315 Ill. 485, 146 N.E. 593 (1925); *People v. Chrisoulas*, 367 Ill. 85, 10 N.E. 2d 382 (1937); *Noelke v. State*, 214 Ind. 427, 15 N.E. 2d 950 (1938); *People v. Furlong*, 187 N.Y. 198, 79 N.E. 978 (1907); *People v. Truck*, 170 N.Y. 203, 63 N.E. 281 (1902); *Commonwealth v. DiStasio*, 294 Mass. 273, 1 N.E. 2d 189 (1936); *Commonwealth v. Butler*, 405 Pa. 36, 173 A. 2d 468 (1961), *cert. denied*, 368 U.S. 972, *rehearing denied*, 368 U.S. 972; *Commonwealth v. Musto*, 348 Pa. 300, 35 A. 2d 307 (1944); *State v. Petty*, 32 Nev. 384, 108 P. 934 (1910); *People v. Bundy*, 168 Cal. 777, 145 P. 537 (1914); *People v. Strong*, 114 Cal. App. 522, 300 P. 84 (1931); *State v. Riggs*, 16

Wyo. 1, 198 P. 2d 349 (1956); *State v. Eastwood*, 73 Vt. 205, 50 A. 1077 (1901); *Wehenkel v. State*, 116 Neb. 493, 218 N.W. 137 (1928); *State v. Genna*, 163 La. 701, 112 So. 655 (1927); *Blocker v. State*, 92 Fla. 878, 110 So. 547 (1926); *Early v. Tinsley*, 286 F. 2d 1 (10th Cir. 1960).

By contrast, the more modern view, cognizant of the need for the personal interview, holds that the interview is scientific in nature and therefore "non-testimonial." *United States v. Albright, supra; United States v. Baird, supra; State v. Whitlow*, 45 N.J. 3, 210 A. 2d 763 (1965).

2. *There is no risk of incrimination flowing from the Patuxent diagnostic examination.*

In *California v. Byers, supra*, this Court found the "mere possibility of incrimination insufficient to defeat the strong policies in favor of disclosure." In *United States v. Freed*, 401 U.S. 601 (1971), this Court found persuasive the fact that gun registration data was not made available to prosecutors.

Taking Petitioner's arguments in their most favorable light, nothing greater than a mere possibility of incrimination has been shown. In fact, a comparison between *Byers* and *Freed* and the present situation would show, Respondent submits, that the actual danger of criminal prosecution is far less in the present situation. *California v. Byers, supra*, dealt with a driver's compelled need to stop and identify himself; if he were drunk, drugged; under-aged, or joy-riding, his risk of criminal prosecution is extremely great. *United States v. Freed, supra*, dealt with a revamped gun registration statute which in its old form had been held unconstitutional. Anyone who takes the position that a gun registration statute carries with it no risk of later incrimination should follow with interest the trial of Angela Davis now in progress. In both *Byers*

and *Freed* the individuals subject to the possibility of incrimination had not been previously criminally tried and convicted; the relevance of this is that the State of Maryland has no compelling desire to gain incriminatory evidence to prosecute individuals already convicted.[15]

Petitioner's reference proves these points. *Avey v. State*, 9 Md. App. 227, 263 A. 2d 609 (1970), involved a pretrial situation where an individual had been referred to Clifton T. Perkins State Hospital for a competency examination, since he raised the issue of insanity. The prosecutor, to prepare for trial on the issue of sanity, requested the records. The Perkins staff *refused* his request unless and until accompanied by a court order, which was procured later. The Court of Special Appeals, in *Avey v. State*, *supra*, found no improper use of the records, particularly as to the issue of guilt or innocence. Nothing could be clearer than the government's need for the results of a competency examination where a defendant raises the insanity plea. *See Greenwood v. United States, supra; Lynch v. Overholser, supra.* This so-called lack of clarity in Art. 35, §13A,[15a] came about solely and only because of the *over*-protectiveness of the psychiatric staff of Clifton T. Perkins State Hospital. If *Avey v. State, supra*, illustrates anything, it is eloquent witness to the difficulty which faces prosecutors in obtaining psychiatric evidence for even a clearly valid use.

As to additional protection, the Maryland courts, in construing Art. 31B, have held that results of these examinations could probably not be introduced without a violation

---

[15] Contrast this situation with cases cited by Petitioner (Brief, pp. 33-35) where the desire to prosecute upon the basis of compelled testimony was apparent.

[15a] Maryland's statute establishing a "psychiatrist-patient" privilege, made applicable to Patuxent by subsection (c) thereof.

of *Miranda v. Arizona*, 384 U.S. 436 (1966). *See Wise v. Director*, 1 Md. App. 418, 230 A. 2d 692, *cert. denied sub nom Wise v. Boslow*, 390 U.S. 1030 (1968). In so stating, the Maryland courts have built an additional barrier against incrimination which is not present in other jurisdictions, which have held that the results of psychiatric tests do not fall within the ambit of *Miranda*.[16] *See also Sas v. Maryland*, 295 F. Supp. 389, 413 (D. Md. 1969).

The unique use of *Miranda v. Arizona*, *supra*, as part of Maryland's three-fold protection[17] against criminal incrimination is in large measure, perhaps, the reason why no disclosure by a patient at Patuxent Institution has been used in a subsequent criminal action in the Institution's seventeen-year history. (J.A. 4, 204.)

The inability of Petitioner to point to *any* example where there is a suspicion (let alone probable basis) that Patuxent records have been used in a criminally incriminatory[18] manner is also testimony bearing witness to the proposition that criminal incrimination has not occurred.

C. A Criminally Tried, Convicted, and Sentenced Individual Referred to Patuxent for Examination Who Refuses To Cooperate Is Not Thereby Deprived of Any Constitutional Rights.

The right of the State to use civil commitment of indefinite duration, where necessary, as a necessary and proper means of vindicating legitimate state interests is

---

[16] See cases referred to at p. 42, Respondent's Brief.

[17] (1) Statutory (Art. 35, §13A); (2) judicial interpretation (*see Wise v. State*, *supra*); (3) psychiatric staff protectiveness (*see, e.g., Avey v. State*, *supra*).

[18] Respondent submits that the allegation of incrimination flowing from the use of a psychiatric examination to make a psychiatric diagnosis and the use of the psychiatric diagnosis as a basis for psychiatric commitment is unsound on its face. However, this point is answered at Arg. II, Respondent's Brief.

no longer open to question. *See Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1940); *Greenwood v. United States, supra; Lynch v. Overholser, supra; cf. Baxstrom v. Herold, supra.* This right of Respondent, as applied to Petitioner and others who choose not to cooperate, does not, in practice, create those hypothecated evils in his list of miscellaneous constitutional violations: (a) equal protection, (b) speedy trial, (c) cruel and unusual punishment, and (d) involuntary servitude.

1. *There is no violation of equal protection flowing from treating uncooperative, undiagnosed possible defective delinquents differently from cooperative diagnosed defective delinquents or the general prison population.*

This argument is comprised of an ornamental citation to the classic case of *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), coupled with the admitted assertion that "things would have been different" for Petitioner if he had not been sent to Patuxent. *See* Petitioner's Brief, p. 30.

The central concern of the Equal Protection Clause is avoiding arbitrary, unfair, and purposeless classifications. The question is not whether a classification has been made, but whether or not that classification is a purposeful, proper one. *See Dandridge v. Williams*, 397 U.S. 471 (1970) (Maryland's maximum grant limitation even where some inequities exist is not violative of equal protection clause which is not designed to impose judicial ideas of social policy); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955); *Flemming v. Nestor*, 363 U.S. 603 (1960).

Factually, there is both a basis in fact and a compelling state interest for drawing the two-fold classification between (1) defective delinquents and the general prison

population, and (2) undiagnosed defective delinquents and diagnosed defective delinquents. As to the reasonableness of the classifications involved, the Maryland Court of Appeals stated:

> "From the voluminous testimony presented in this case we determine that the conclusion of the Fourth Circuit Court in *Sas* is justified when that court decided that the statutory definition was facially constitutional. We say this because the evidence before us clearly shows that there does in fact exist a class or group of persons falling within the definition, constituting a danger to the health and safety of people and who, with the aid of medical expert testimony, after appropriate examination, using recognized medical techniques, are discernible and recognizable by lay persons, including judge or jury. In fact, it is clear from the testimony of nearly all the eminent medical experts specializing in psychiatry testifying in this case that the defective delinquent definition as contained in the statute is no less vague and difficult of understanding or difficult of application to individual persons than are the M'Naghten or Durham rules used in testing criminal responsibility, or the civil insanity rule used in Maryland to determine the need for confinement in a mental hospital of persons suffering from mental disease sufficient to cause them to be 'a danger to themselves or others'. These same eminent medical experts, however, agree that there in fact does exist a medical recognizable group falling clearly within the definition in the Act's definition, and we so find." *Director v. Daniels*, 243 Md. at 33-34.

The Maryland Court of Appeals, in further describing this class, went on to say:

> "Based on the testimony, we fear that without the indeterminate provision in the Act, violence would be done to its basic concepts and purposes, and much of the good sought by this legislation would go for naught. The very qualities making up the nature of an indi-

> vidual at Patuxent, with his warped attitudes and distorted outlook, would dictate to him that he antisocially wait out his allotted time, resisting introspection and any kind of reappraisal of his makeup, and refusing to cooperate in receiving available therapy to any degree that would give promise of his ultimate rehabilitation." *Id.* at 40.

Thus, it is factually apparent that defective delinquents are a recognized class, and that one of the traits of that class is non-cooperativeness where it will appear that non-cooperativeness will serve a selfish and antisocial purpose.

2. *The absence of a civil determination of defective delinquency caused by Petitioner's non-cooperation does not involve a question of "speedy trial."*

Initially, it must be noted that not mere speed, but orderly expedition, is required in the administration of justice. A litigant can therefore not complain of delay and disorder caused by his own conduct. *See Shepherd v. United States*, 163 F. 2d 974 (8th Cir. 1947); *United States v. Graham*, 289 F. 2d 352 (7th Cir. 1961); *United States v. Lustman*, 258 F. 2d 475 (2d Cir.), *cert. denied*, 358 U.S. 880 (1958); *Morland v. United States*, 193 F. 2d 297 (10th Cir. 1951). *Compare People ex rel. Myers v. Briggs*, 46 Ill. 2d 281, 263 N.E. 2d 109 (1970) (mute unable to communicate held entitled to opportunity for trial on pending indictments or release inasmuch as handicap "will not prevent his being subject to trial").[19]

More to the point is the unstated assumption that the right of speedy trial ought to be expanded to cover proceedings not related to the adjudication of guilt, innocence, or criminal penalty. The Sixth Amendment requires only that "[i]n all *criminial* prosecutions, the accused shall en-

[19] Petitioner's Brief, p. 31.

joy the right to a speedy and public trial, ..." (Emphasis supplied.) The distinction is not a matter of mere "labels," since a criminal accused can be subject to increasing prejudice as delay continues but suffers decreasing prejudice if he responds to proper diagnosis and treatment.

Petitioner's position ignores the basic fact that the therapeutic treatment of mental illness may take a considerable period of time. Petitioner harkens for a system of swift, vengeful, criminal justice which merely exacts a speedy penalty in terms of time from the offender; he apparently rejects as valid the notion that society has a greater need for slower rehabilitation of the criminal, be that by conventional means or by the treatment of the defective delinquent.

Thus the use of orderly deliberation and procedures in psychiatric judgments varies considerably from the need for dispatch and speed during guilt adjudication to avoid the evaporation of necessary evidence. *See United States ex rel. Thomas v. Pate*, 351 F. 2d 910 (7th Cir. 1965); *Howard v. United States*, 261 F. 2d 729 (5th Cir. 1958).

3. *A decision not to accede to the wishes of a non-cooperative inmate is not cruel and unusual punishment.*

As usual, Petitioner's cruel-and-unusual-punishment contention is a variation on themes developed elsewhere; the words are differently arranged but the melody is the same.[20] Needless to say, length of sentence per se is not control-

[20] Cruel and unusual punishment because of absence of treatment or judicial findings or possibility of unequal treatment. Compare other arguments: (1) unequal protection because of cruel punishment because not treated or released; (2) no treatment because of absence of judicial finding after hearing, etc., etc.

ling on the question of cruelty. *See* Annotation, "Cruel Punishment — length of sentence," 33 A.L.R. 3d 335 (1970), and cases cited therein. In viewing the nature and purpose of Respondent's action (failure to accede to the wishes of a non-cooperative inmate) rather than its severity, it is apparent that Respondent's actions are not "greatly disproportionate" to Respondent's interests.[21] *See Weems v. United States*, 217 U.S. 349, 371 (1910). *See also Graham v. West Virginia*, 224 U.S. 616 (1912). *Compare Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947) (execution in a cruel *manner*) and *Robinson v. California*, 370 U.S. 660 (1962) (punishment where no "*irregular* behavior").

Only by presuming — contrary to fact — cruelty, unusualness, and punishment is Petitioner able to allege cruel and unusual punishment.[22]

4. *There is no involuntary servitude at Patuxent.*

The Thirteenth Amendment provides that:

> "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist . . . ."

Outside certain narrow contexts, arguments before this Court relying on the involuntary servitude provision have been summarily rejected. *See United States v. Petrillo*, 332 U.S. 1 (1947); *Butler v. Perry*, 240 U.S. 328 (1916). Also to the question of the lack of involuntary servitude involving insanity commitment after acquittal, *see State ex rel. Thompson v. Snell*, 46 Wash. 327, 89 P. 931 (1907).

---

[21] In "Crime Prevention by the Indeterminate Sentence," 128 *American J. of Psychiatry* 3 (1971), Dr. Hodges reported his finding that of those recommended for commitment to Patuxent by the staff but who were not committed, 81% were found to have committed new crimes, a rate significantly greater than those released from Patuxent after treatment (37%).

[22] *Compare* Petitioners' reliance upon *United States ex rel. Schuster v. Herold*, 410 F. 2d 1071 (2d Cir. 1969).

II.

AN INDIVIDUAL TRIED, CONVICTED, AND SENTENCED FOR A PARTICULAR CATEGORY OF CRIMES AND THEN REFERRED BY COURT ORDER TO PATUXENT FOR EVALUATION DOES NOT HAVE HIS CONSTITUTIONAL RIGHTS VIOLATED BY RETAINING HIM UNTIL SUCH TIME AS HE COOPERATES WITH THE PROFESSIONAL STAFF SEEKING TO DETERMINE WHETHER OR NOT HE IS A DEFECTIVE DELINQUENT.

Petitioner posits that (1) a referral to Patuxent for evaluation without an adversary judicial hearing, plus (2) the possibility of indeterminate commitment in the diagnostic stage of commitment, equals (3) an indeterminate commitment without notice or hearing. The fallacy of this equation is the presumption that it is "state action" which leads to the unfortunate result, whereas the facts reveal that it is Petitioner's action — or more accurately, his non-cooperative inaction — which has frustrated his *opportunity* for a hearing.

A. Non-Cooperation Is A Proper Basis For Deferring A Hearing Upon An Issue (Defective Delinquency) Which Requires His Cooperation To Determine.

It is well settled that an otherwise available constitutional right can be forfeited by deliberate misconduct. *See McKart v. United States*, 395 U.S. 185, 194-95 (1969) (judicial review of Selective Service actions jeopardized by "frequent and deliberate flouting of administrative processes" thereby undermining the scheme of decision-making by denying the administrative agency important opportunities to "develop the necessary factual background" and "apply its expertise"); *Illinois v. Allen*, 397 U.S. 337 (1970) (right of accused to be present at trial lost by misconduct); *Fay v. Noia*, 372 U.S. 391 (1963) ("deliberate bypass" of state procedures leading to a bar to federal habeas corpus); *McKissick v. United States*, 398 F. 2d 342 (5th Cir. 1968)

(no double jeopardy where new trial needed because of defendant's misconduct); *Shepherd v. United States, supra* (fugitive from justice losing right to speedy trial).

The premises behind Petitioner's refusal to cooperate are that his non-cooperation is permissible because (a) he possesses the privilege against criminal self-incrimination which can be asserted at the evaluation procedures at Patuxent,[23] and (b) he possesses some type of undefined right to avoid involuntary civil commitment which he can protect by means of non-cooperation.

B. Inmate Cooperation and Disclosure Are Essential To A Proper Diagnosis of Defective Delinquency.

In reviewing statutes requiring disclosure being attacked on self-incrimination grounds, this Court on numerous occasions has affirmed the requiring of disclosures where (a) requiring disclosure was reasonably related to a legitimate non-penal state purpose, and (b) disallowing required disclosure would frustrate that purpose. *See California v. Byers, supra* ("hit and run" statute); *United States v. Freed, supra* (firearms registration); *Shapiro v. United States,* 335 U.S. 1 (1948) (price control records); *United States v. Sullivan,* 274 U.S. 259 (1927) (income tax records). As this Court noted in *Byers* at pp. 427-28, examples of similar disclosures are "legion."

1. *The results of personal diagnostic interviews and inmate cooperation generally are extremely necessary to a full and fair administrative factual recommendation of defective delinquency.*

Whether or not the results of inmate cooperation, chiefly in the form of personal interviews, are necessary to a full, complete, and accurate diagnosis of defective delinquency

[23] *But see* Argument IB, Respondent's Brief.

is a central issue in this case, as shown by an analysis of Petitioner's chain of reasoning.[24]

Aside from the dubious assumption that without the presence of initial inmate trust no treatment can occur,[25] these links in Petitioner's chain of argument are only as strong as the weakest parts which, Respondent would submit, are the factual presuppositions that (1) findings of defective delinquency can be adequately and fairly made without the input (internal feelings, answered questions, test scores, leads) volunteered by a cooperative inmate; and (2) the results of inmate cooperation are, in fact, available and usable by prosecutorial officials.[26]

In the diagnosis of a mental condition, the value of a personal psychiatric or psychological interview and other manifestations of patient cooperation has been continually reaffirmed by factual studies[27] and judicial decisions.[28]

---

[24] *See* Respondent's Appendix D, "Chart of Petitioner's Reasoning," which purports in a limited sense to describe the flow of Petitioner's reasoning.

[25] The assumption that you cannot treat an inmate who does not trust his psychiatrist is contrary to both the legislative basis for Art. 31B and the record of its successes. One of the symptoms of defective delinquency is a non-trusting, exploitive relationship to other people. Further, both the general recidivist record and its successes with previous non-cooperators shows Patuxent staff's validation of the legislative basis and the Maryland legislature's careful craftsmanship in drafting Art. 31B.

[26] This second factual assumption is dealt with elsewhere (*see* Respondent's Brief, Argument IB2).

[27] *See, generally,* Rapaport & Marshall, "The Prediction of Rehabilitative Potential of Stockade Prisoners Using Clinical Psychological Tests," 18 *J. Clinical Psychology* 444 (1962); Affleck & Garfield, "Predictive Judgments of Therapists and Duration of Stay in Psychotherapy," 17 *J. Clin. Psych.* 134 (1961); Freeman & Mason, "Construction of a Key to Determine Recidivists From Non-recidivists Using the MMPI," 8 *J. Clin. Psych.* 207 (1952); Bergin, "Some Implications of Psychotherapy Research for Therapeutic Practice," 71 *J. Abnormal Psych.* 235 (1966); Krash, "The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia," 70 *Yale L.J.* 905, 918 (1961). These

Only slightly different from the general question of cooperation is the issue of cooperation in answering personal questions asked at an examination; slightly different than that concern is the problem of answering questions which focus upon past or present criminal conduct.

The administrative inability of bifurcating or even trifurcating the question of patient cooperation into classifications which would allow for partial non-cooperation is adequately illustrated in Petitioner's brief: (1) The answer to *any* question could provide "a link in the chain of evidence" sufficient to connect Petitioner to criminal activity, *see Malloy v. Hogan*, 378 U.S. 1, 11 (1964); and (2) one of the areas of greatest concern to the Patuxent staff is an inmate's history of criminal behavior, to show "antisocial behavior," which is part of the definition of a defective delinquent in Art. 31B, § 5. *See also State ex rel. Haskett v. Marion County Criminal Court, supra.* As Petitioner's brief points out (pp. 38-39), this area is an in-

---

reference and others are not cited in support of a given theory or to prove a given result. However, implicit in the fiber of clinical psychology is that proper diagnosis of a present mental condition requires some type of input that can only be gained by the patient's cooperation (catatonia excepted). Unless Petitioner's posited "other means" of diagnosis and treatment include some type of "A Clockwork Orange" methodology ("Ludovico Technique," truth serum, lie detectors, hypnosis, lobotomy), the need for patient cooperation is paramount. Petitioner's references merely establish that valuable information can be gained without cooperation, a fact that Respondent does not deny. However, there is more than a mere basis in fact to support the Patuxent staff's conclusion as to the necessity of cooperative patient input in diagnosis of defective delinquency.

[28] *See, generally, United States v. Day*, 333 F. 2d 656 (6th Cir. 1964); *Rollerson v. United States*, 343 F. 2d 269 (D.C. Cir. 1964); *Krupnick v. United States*, 264 F. 2d 213 (8th Cir. 1959); *Gearhart v. United States*, 272 F. 2d 499 (D.C. Cir. 1959); *United States v. Albright, supra; State v. Whitlow, supra; State v. Musgrove*, 241 Md. 521, 217 A. 2d 247 (1966).

dispensably pertinent concern for the diagnosis of defective delinquency. The focus upon past criminal behavior is not for the purpose of singling out a "highly selective group inherently suspect of criminal activities." *See Albertson v. S.A.C.B.*, 382 U.S. 70, 79 (1965). Since Patuxent referrals are all criminally tried and convicted individuals, there is certainly no purpose in using Patuxent as a high-priced trap to catch the unwary criminal and further enmesh him in the correctional process. Unlike the *Alberston* situation, the whole raison d'etre of Art. 31B is to liberate otherwise hopelessly criminal individuals from the correctional system and liberate the public from the costs of a high recidivist rate.

The "focusing" on criminal activities of inmates and referred individuals is not, therefore, the mark of evil intentions, but rather the indispensable means of identifying a type of compulsively anti-social individual, the defective delinquent.

In support of this argument, Petitioner has noted several courts in Maryland that have required Patuxent officials to attempt to diagnose without personal cooperation. by reference to these cases Petitioner has proven too much. In effect, he has shown the availability of a judicial hearing where an inmate is not cooperative if — and only if — in that particular case the staff feels that there is enough on the record to support the presence or absence of defective delinquency, in the opinion of the Patuxent staff. However, by reference to his own sparse record, Petitioner has proven too little. He has shown that, in his case, without his cooperation the Patuxent staff would never be able to make the necessary diagnosis as to the presence or absence of defective delinquency.[29]

[29] *See* Affidavits in Appendix A-C, Respondent's Brief.

Were Petitioner's position adopted by this Court, the mode of identifying and treating the criminally insane in this country would be put in disarray. An individual suspected of being mentally ill would be free to remain silent, with the manifest result of wrongful diagnosis of insanity and/or an epidemic of refusal. *Compare United States ex rel. Schuster v. Herold, supra* at 1086-87. Indeed, the insane, by refusing to raise the insanity defense, could, it is contended, frustrate the desirable and humanitarian aspects of 18 U.S.C.A. § 4245 (mental incompetency undisclosed at trial), which presently requires the Director of the Bureau of Prisons to notify the district court wherein the conviction was had of the probable cause that the prisoner was mentally incompetent at the time of trial (where commitment could exceed the sentence originally imposed), thus leaving the ill untreated.

In *People v. Lipscomb, supra,* the defendant claimed his Fifth Amendment rights were violated by § 3100.6 of the California Welfare & Inst. Code. The Court in *Lipscomb* observed that to apply the self-incrimination doctrine to civil commitment proceedings for all types of mentally and physically irresponsible persons would do violence to the legislative policy upon which the law is based. (In both California and Maryland the statements made are not used in later criminal proceedings.) The Court's attention is directed to the excellent language found in *Lipscomb* at pp. 130-31, wherein the needs of society vis-a-vis the individual are discussed in the context of a psychiatrist's examination. This was further amplified by Judge Winter in *United States v. Albright, supra:*

> "Not only to enable the government to carry its full load, but also to respect the inviolability of the human personality, the examination here was indicated. Should defendant's claim of self-incrimination be upheld, the government, to meet its burden of proof,

> would have access to only three kinds of proof: cross-examination of defendant's experts, lay testimony, and testimony of government experts predicated upon courtroom observations and hypothetical questions. Medical science, as Rollerson v. United States, 110 U.S. App. D.C. 400, 343 F. 2d 269 (1964), eloquently recognizes, deems these poor and unsatisfactory substitutes for testimony based upon prolonged and intimate interviews between the psychiatrist and the defendant. Half truths derived from these unsatisfactory substitutes do more to violate human personality than full disclosure, especially because there is always the possibility that the psychiatrist who examines for the government and thus has full knowledge of a defendant, may corroborate his contention that he is legally insane." 388 F. 2d at 724-25.

See also Battle v. Cameron, 260 F. Supp. 804, 806 (D.D.C. 1966).

The end result of holding that Petitioner is not required to submit to a psychiatric examination will be the frustration of every sexual psychopath statute in the country and chaos in the determination of insanity in criminal cases.

In his Argument II(c) Petitioner asserts that "from his own mouth" the State seeks "the basis for making that [actual danger to society] determination" which "leads to indefinite incarceration" and is thereby "incriminatory" regardless of "labels" of "civil" or "criminal." One of the inarticulated bases of this argument is that there exists a right to avoid civil commitment as a part of "substantive due process" and that Petitioner can exercise a type of "self-help" (non-cooperation) to enforce that right.[30] *See* Petitioner's Brief, p. 15.

---

[30] Since almost half of those referred to Patuxent for diagnosis are determined to be non-defective delinquents, the best strategy for a non-defective delinquent is cooperation.

It was an established principle of law, current during the Constitutional Convention of 1789 which produced the Fifth Amendment right against self-incrimination, that the right ought not apply to civil proceedings. In civil actions then, as now, a party against whom a judgment had been rendered was bound on pain of being held in contempt of court to divulge the location of his assets and property in order to satisfy the judgment. The Constitutional Convention specifically rejected the application of the provision against self-incrimination to civil proceedings. The research done by Levy in *The Origins of the Fifth Amendment* discloses that James Madison originally conceived of the Fifth Amendment right against self-incrimination to include civil as well as criminal proceedings. The Convention did not adopt the Madison version and restricted the right. *See* Levy, *ibid.*, pp. 423-26.

2. *Failure to allow the state to require that an inmate cooperate instead of waiting out his alotted sentence would frustrate the entire process of defective delinquency diagnosis and treatment.*

Although the Internal Revenue Service can occasionally reconstruct an individual's income picture without his cooperation, it is readily apparent that the entire revenue structure of this country would be jeopardized if objective reconstruction were made necessary because of the whim of non-cooperative taxpayers.

The story of Lawrence McKenzie, recounted in part by Petitioner (Brief for Petitioner, pp. 24-27), is an illustration of the difficulty of the "objective reconstruction" approach to diagnosing defective delinquency. Transferred to Patuxent on January 13, 1965, McKenzie refused to be examined on at least sixteen different occasions before the

Patuxent staff was judicially compelled to make a "blind guess," stating:

> "This patient has never been examined by the Institution Diagnostic Staff. While on the basis of the information available to us he might seem to satisfy the criteria of Defective Delinquency by virtue of his repeated antisocial activity and obvious danger to children, as well as the possibility of some inferred emotional unbalance, such a conclusion would be open to revision by the provision of some modicum of information from the patient. Since the Court has ordered an 'examination' and recommendation in regard to this patient, the only recommendation that can be made here is that he be committed to this Institution as a Defective Delinquent since he is, on the basis of history alone, a clear and present sexual danger to children in the community."

The summary report contained information from the following sources:

(1) FBI records of past offenses and indecent conduct, particularly toward minors. *Query:* If a non-cooperator is a first offender, at least under the alias he is using, wherein would the source of this information be found?

(2) A social questionnaire answered by his sisters. *Query:* Would his family also be entitled to not cooperate? Where would Patuxent conveniently learn about an out-of-state resident's family?

(3) Academic record (including a college degree in Naval Science). *Note:* Consider the non-cooperative school drop-out, perhaps from out of state.

(4) Military history, including a dishonorable discharge for lascivious conduct. *Note:* Consider the draft evader.

(5) Electroencephalographic examination for organic brain damage. *Note:* McKenzie refused to cooperate.

(6) Disciplinary infractions. *Note:* Consider the new admittee's lack of a disciplinary record, or the normally well-behaved individual with an aberration not likely to show up in the disciplinary records (*e.g.*, arsonist).

(7) Patient's version of current offense. McKenzie gave some discussion. *Query:* What if he refused to talk about it at all? Also, would *Miranda v. Arizona, supra*, compel the non-questioning once a refusal was given?

(8) Family history (see no. (2)).

(9) Religion, school history, work history, military history, sexual and marital history, hobbies and interests, psychiatric history. *Note:* Inability to personally examine McKenzie led to inadequate information.

Throughout the summary are the Patuxent staff's warnings about the extreme tentativeness of its conclusions. Had McKenzie lacked a continuous documented history of child molesting or other classic symptoms of anti-social behavior, Respondent submits that diagnosis would have been impossible. McKenzie, as a continual offender, with a college degree, left a fairly traceable "paper trail" of his actions. Imagine the situation the staff would be confronted with by a non-cooperative offender who is a drop-out, from out of state, who lacked a military history. This hypothetical individual, or one possessing many of the traits, is not hard to imagine as a reality.

Disallowing required cooperation might well create a discriminatory situation against those individuals who have a "paper trail" who, paradoxically, in many circumstances might be the better behaved.

Disallowing required cooperation would leave free from attack only those statutes possessing objectively rigid standards (subsequent offender or sex offender statutes)

and subject to attack or frustration all statutes which require a determination as to whether the particular individual is a fitting and proper subject for indeterminate sentencing.[31]

There have been many occasions when this Court has attempted to set up as absolute a given individual's prerogatives against attempts by governmental bodies to implement and advance a well-defined, compelling interest. *See Ashton v. Cameron Co. W.I. Dist. No. One*, 298 U.S. 513 (1936); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 427 (1895); *Dred Scott v. Sandford*, 60 U.S. 393 (1857). In each case, where the government's interests were genuinely compelling and the individual's prerogative genuinely of lesser importance, the end result of this Court's actions has not been enduring constitutional rights but instead frustration of governmental and community purposes.

The need of the community to find a means to protect itself by means of reformation from otherwise unreformable subsequent offenders is absolutely genuine. The means chosen are necessary and proper; in fact, they are, in Art. 31B, restrained and judicious. Denying Maryland the tools of rehabilitation may compel her to return to the weapons

---

[31] Compare the objectively rigid statutes (a) with those requiring some type of personal diagnosis (b):

(a) Ohio Rev. Code Ann. Sec. 2947.25 (Baldwin 1958) (must refer for examination all persons convicted); Utah Code Ann., Sec. 77-49-1 (1953) (convicted of rape . . . the judge shall order a mental examination);

(b) Mass. Ann. Laws, Ch. 123A, Sec. 1 (Supp. 1958) (general lack of power to control his sexual impulses); Ill. Rev. Stat. Ch. 38, Sec. 820.01 (1959) (mental disorder . . . coupled with criminal propensities); Pa. Stat. Ann. Titl. 19, Sec. 1166 (1958) (threat of bodily harm); 42 U.S.C.A. 3413 (addict likely to be rehabilitated by treatment).

of vengeance (*e.g.*, mandatory indeterminate incarceration for habitual criminals convicted of certain crimes).

3. *The Maryland Statutory Scheme embodied in Art. 31B requires inmate cooperation.*

The psychological examination required by Art. 31B, § 7(a), mandates personal interviews with the examinee in order to reach a valid determination. Psychological tests are an important part of the evaluation process at Patuxent Institution, which render any determination made more valid than under any of the twenty-five sexual psychopath statutes set forth in Respondent's statement of the case. That the same are not required under any of the foregoing statutes, and are generally not done in most mental hospitals as a matter of routine procedure, is clear. (J.A. Md., 621.) Further, a determination based on tests and data from other psychological tests would lack the proper validity by reason of lack of information regarding the test protocols; the validity of the prior tests which can only be determined by the administrator of the same, the age of the prior tests, and the fact that the prior tests given might not be the ones necessary to a determination of defective delinquency. The validity of a psychological test comes primarily from the tester's observation of the examinee and in his ability to create a proper atmosphere for the administration of the test. If the examinee is anxious, does not understand instructions, or has a poor grasp of the language, these factors would make the test invalid. A psychologist observing the results of someone else's examination would have no way of knowing whether any of these factors entered into the final results. The necessity, therefore, of recent tests given by the examining psychologist in order to make a determination of defective delinquency is set forth in the Affidavit of Dr. Sigmund Manne, attached to Respondent's Brief as Appendix B.

Art. 31B, § 7(a), sets forth one of the more valid methods of determining anti-social mental illness in any statutory scheme in this country. The record is replete with testimony showing the necessity of personal examinations in order to avoid slipshod or invalid diagnoses. The staff at Patuxent Institution is highly dedicated to its task.

> "This Court was most favorably impressed by the Director and his staff who testified. They impressed the court as being capable, and humane, truly interested in the inmates as individuals, and sincerely endeavoring under extremely trying circumstances, to help them to improve themselves, and hopefully, to be released." *Sas, supra,* 295 F. Supp. at 420, n.79.

Petitioner assumes that Art. 31B requires an examination and evaluation by a psychiatrist only, without referring to the multi-disciplinary necessity of an examination by a psychologist and medical doctor contained in Art. 31B, § 7(a). In support of his assumption that a psychiatrist can diagnose without the necessity of a personal examination are cites to the inapposite cases of *McKenzie v. Director,* Law No. 39033, Circuit Court for Prince George's County, Opinion and Order dated July 7, 1970, and *Davis v. Director,* Misc. Pet. No. 4410, Circuit Court for Montgomery County, Opinion and Order dated Dec. 11, 1971.

McKenzie involved facts dissimilar to those before this Court. Quoting from the Opinion and Order in *McKenzie* the testimony of Dr. Manfred S. Guttmacher in *Director v. Daniels* "that diagnosis of a referred inmate who 'remains completely silent' would require 'a long period of surveillance . . .'" is misleading. The full statement of Dr. Guttmacher was that:

> "Well, we have very few objective tests in our field. The same thing is true, of course, in the commitability

to a hospital. *If the patient remains completely silent, you would have a great difficulty in making a diagnosis. You would have to have a long period of surveillance to be able to arrive at a diagnosis.* It is what the patient says and what the patient does, and the doing is very important as well as the saying." (Emphasis supplied.) (J.A. Md., 258-)

Dr. Guttmacher did not say that one *could* make a diagnosis, but implied in the proper case that it *might be possible.* Dr. Boslow was very clear in his testimony before the United States District Court for the District of Maryland in *Sas v. Maryland,* 295 F. Supp. 389 (D. Md. 1969), when he stated, in response to a question by the Court as to whether he would make a diagnosis based on reliable information in the record:

"(The Witness) No, sir, I would feel that I could not make an adequate professional judgment on that basis . . . . *No sir, because it would be unfair to both the patient and the man giving the opinion.* The patient might be psychotic, for all you know, and you would not be able to evaluate this without an interview. . . .

"(The Court) Because it might be something more than defective delinquency; it might be an actual psychosis.

"(The Witness) Yes, sir." (Emphasis supplied.) (J.A. Md., 310-13.)

This testimony was clearly reinforced by Dr. Boslow in his testimony before the Court in *McKenzie, supra,* held on May 1, 1970. He testified that a personal examination meant exactly that, an interview with the patient, and that there was no substitute for a personal interview because "you can make certain generalities, but you cannot say what is going on." *McKenzie, supra,* Transcript of Testimony, p. 51. *See also* pp. 49-52. Notwithstanding the obvious import of this testimony, the Court in *McKenzie* held

that because a psychological examination had been given at Patuxent Institution, in this particular case there was sufficient information for the psychiatrist to also make an examination. The Court in *McKenzie* further overlooked the obvious import of *State v. Musgrove, supra*, where the Court of Appeals of Maryland held that the personal examination *meant* personal examination if the examiner felt it necessary in order to reach a valid opinion:

> "Conceivably, this would not always require the patient to talk to the examiner although it would seem that usually it would, as the record indicates was true in the case before us. Significantly, the requirement is not only that the examination be 'personal' but that it also be the '[examiner's] own.' *This, we think, unequivocally implies that the examiners were to apply their expert knowledge in reaching a determination as to the defective delinquency of the patient.*" (Emphasis supplied.) *State v. Musgrove*, 241 Md. at 531.

When forced by the Court to make a determination in *McKenzie, supra*, Patuxent Institution did not relate solely that "it is the opinion of the staff of this Institution that Lawrence Harper McKenzie is a defective delinquent . . . ." What the report of Patuxent Institution did say was:

> "This patient has never been examined by the Institution Diagnostic Staff. While on the basis of the information available to us he might seem to satisfy the criteria Defective Delinquency by virtue of his repeated antisocial activity and obvious danger to children, as well as the possibility of some inferred emotional unbalance, such a conclusion would be open to revision by the provision of some modicum of information from the patient. Since the Court has ordered an 'examination' and recommendation in regard to this patient, the only recommendation that can be made here is that he be committed to this Institution as a Defective Delinquent since he is, on the basis of

history alone, a clear and present sexual danger to children in the community."

Thus, Patuxent takes its duties seriously, insisting on making the most valid determination possible.

Davis, supra, again involved findings by the Circuit Court for Prince George's County, as set forth on p. 28 of Petitioner's brief, that " 'direct verbal communication between inmate and psychiatrist, although desirable, is not indispensable' to making the report required by statute . . . ." The Court in *Davis* again dwelt solely on the ability of a psychiatrist to make an examination without a personal interview and not on the ability of the psychologist to make such a diagnosis without his testing procedures.[32] The Court accepted the testimony of Dr. Brian Crowley that a diagnosis without personal interview was in fact possible, citing catatonic schizophrenia, a condition exhibiting symptoms of the total withdrawal of an individual from reality. Such a diagnosis could be made by virtually any lay individual and is an inadequate basis for the statement:

---

[32] The State filed a petition for the issuance of a writ of certiorari to the Circuit Court for Montgomery County in the Court of Special Appeals of Maryland, which denied the same on January 8, 1972, but including the following language:

> "It appearing that the order sought to be reviewed was entered in apparent disregard of the clear dictates of *State v. Musgrove,* 241 Md. 521; it further appearing, however, that the order sought to be reviewed was entered in a habeas corpus proceeding, and that this Court is without jurisdiction to review orders entered in such cases, either on direct appeal, *Hudson v. Superintendent,* 11 Md. App. 253, or on certiorari, Md. Code, Art. 5, §21, it is this 8th day of January, 1972, ordered by the Court of Special Appeals of Maryland, that the petition for a writ of certiorari to the Circuit Court for Montgomery County in the above-entitled case be, and it is hereby, denied for lack of jurisdiction." *Director v. Davis,* Court of Special Appeals of Maryland, Misc. No. 23, Sept. Term, 1971.

Petitioner's reference to the "dictum" in *Musgrave, supra,* overlooks the holdings in *Wise v. Director, supra; Knox v. Director,* 1 Md. App. 678 (1969).

"Thus, it is factually inaccurate for the state to assume in all cases and without further explication that an inmate such as McNeil must be personally interrogated before he can be diagnosed" (Brief of Petitioner, p. 28.) The concern over such a "blind diagnosis" is fully set forth in the affidavit, attached as Appendix C to Respondent's Brief, by Dr. Harold M. Boslow, Director of Patuxent Institution.

4. *There are no fair and effective lesser restrictive alternatives to a compelled personal psychological examination of inmates referred to Patuxent,*

Initially, Respondent submits that (a) differences in place of incarceration, per se, and (b) the "right" not to be psychologically examined are *not,* at least for criminally tried and convicted individuals, such "fundamental liberties" as to compel the State to use "the least restrictive alternative" available to it. *Compare Shelton v. Tucker,* 364 U.S. 479 (1960); *Sherbert v. Verner,* 374 U.S. 398 (1963); *N.A.A.C.P. v. Button,* 371 U.S. 415 (1963).

As shown in other arguments, (1) Patuxent is not such a "strikingly" dissimilar *place* from other penal institutions, in an *adverse* sense, as to compel a prior hearing before transfer; Respondent concedes that the *status* of defective delinquency is so "strikingly" dissimilar from prison inmate as to require a full-scale trial as provided for in Art. 31B, § 8. *Compare Baxstrom v. Herold, supra;* and *Covington v. Harris, supra* (note taken of "striking" dissimilarities between criminal and civil hospitals for the insane); (2) aside from the possibility of commitment to Patuxent, there is no substantial reason for refusing to cooperate.

However, there is a compelling governmental interest in requesting this Court, if it should find flaw in the Maryland procedure, to give some indication as to what it considers to be effective lesser restrictive alternatives.

A review of these alternatives, it is suggested, would show that (1) many are ineffective, and (2) the remainder, though constitutionally acceptable, are much more drastic.

a. Rebuttable presumption of defective delinquency flowing from diagnostic non-cooperation.

The State is confident that there is a basis in fact for concluding that non-cooperators are, more probably than not, defective delinquents. *See Leary v. United States*, 395 U.S. 6 (1969) (criminal test "rational connection"); *Mobile J. & K.C. R.R. Co. v. Turnipseed*, 219 U.S. 35 (1910) (civil test not "purely arbitrary"). *See, generally, Note*, Presumptions, Assumptions, and Due Process in Criminal Cases — A Theoretical Overview," 79 *Yale L.J.* 165 (1969). The State's concern with this possibility is not the constitutionality, but the advisability, of its use. This alternative merely defers until a later day the need for cooperation. As with presumptions in other areas, it increases the chance of non-delinquents being placed in Patuxent when compared with the present method.

Analogous to this alternative are procedures differing from it in form but not in substance. *See Lee v. County Court of Erie County*, 33 App. Div. 2d 1093, 308 N.Y.S. 2d 240 (4th Dept. 1970), *modified*, 27 N.Y. 2d 432, 267 N.E. 2d 452 (1971), *cert. denied*, 404 U.S. 823 (1971) (trial court struck an insanity defense and appellate court modified, holding proper remedy to be disallowing defendant the opportunity of presenting psychiatric evidence), *criticized in Case Note*, 38 *Brooklyn L.R.* 211 (1971). In *Lee* the New York Court of Appeals felt compelled to take this novel step because of the difficulty in using the results of a *pre-trial* psychiatric examination in a *non-bifurcated* trial, noting the possibility of damaging admissions going to the question of guilt. These difficulties do not present themselves in the Maryland statute.

In passing, it might be mentioned that if Maryland were to make non-cooperation a crime punishable by indeterminate commitment at Patuxent for anyone tried and convicted of a crime permiting referral, there is a possibility that such action would not be cruel and unusual punishment. *See Annotation,* "Cruel Punishment, Length of Sentence," 33 A.L.R. 3d 335 (1970).

It is urgently suggested that these alternatives, as damaging as the present one, would not serve the State of Maryland's legitimate interest in isolating for treatment a "clearly defined" group of defective delinquents. *See Director v. Daniels, supra.*

b. Information from sources not requiring personal examination and/or other general cooperation.

(1) Social history type report.

One can only surmise how potent Petitioner Murel's indictment of the administrative fact-finding process would have been had Patuxent officials been denied the opportunity for a personal interview and/or other input resulting from inmate cooperation. *See* briefs in *Murel v. Baltimore City Criminal Court, supra.* Whether in given cases this method of blind guessing would provide the necessary residuum of non-hearsay evidence of sufficient probative value is anybody's guess. *See generally, Annotation,* "Hearsay Evidence in Proceedings Before State Administrative Agencies," 36 A.L.R. 3d 12 (1971).

(2) Lie detector.

As Bailey & Rothblatt point out in *Investigation and Preparation of Criminal Cases* 370 (1970), the optimum conditions for the accuracy of a polygraph test are (a) voluntariness, and (b) proper physical and mental condition. For further research, *see generally Annotation,*

"Truth and Deception Tests," 23 A.L.R. 2d 1306 (1952).
(3) Observation in controlled environment.

Whether concealed, care examination of a subject's daily routine would provide, in itself, sufficient evidence of defective delinquency is quite speculative. However, it would seem to be very drastic to put an inmate in the position of feeling that every action he might take or word that he might say is being scrutinized for hidden meaning. Patuxent staff members might well object, on ethical grounds, to risking the inducing of paranoia in order to diagnose defective delinquency.

c. Alternate means of committing defective delinquents in a manner not involving personal evaluation and/or inmate cooperation.

Rigidly objective standards in subsequent offender statutes or habitual criminal statutes allowing for indeterminate sentences have been held constitutionally permissible. *See Graham v. West Virginia, supra.* Under such circumstances, if the indeterminate sentence were mandatory, then, although constitutional, such a statute would be both under- and over-inclusive as to the legitimate needs of the State. If the indeterminate sentence was discretionary with the trial judge, then the *very best* that could be hoped for is a "clandestine Patuxent" doing what an overt Patuxent was forbidden to do.

C. Whether Or Not An Inmate Has Served the Time Allotted by the Criminal Sentence Is Irrelevant to the State's Right to Civilly Commit Him.

1. *Commitment status prior to expiration of his originally imposed sentence.*

In the absence of a showing of constitutionally impermissible conditions of habitability, an inmate has no vested

constitutional right to a given place of confinement as opposed to other places; administrative transfers based upon reasonable purposes, from one place of confinement to another, are not offensive to the Constitution. *See Young v. Wainwright*, 449 F. 2d 338 (5th Cir. 1971); *Wilwording v. Swenson*, 439 F. 2d 1331 (8th Cir. 1971); *Thogmartin v. Moseley*, 313 F. Supp. 158 (D. Kan. 1969); *United States ex rel. Gallagher v. Daggett*, 326 F. Supp. 387 (D. Minn. 1971); *Courtney v. Bishop*, 409 F. 2d 1185 (8th Cir. 1969).

2. *Commitment status after the expiration of his originally imposed sentence.*

Whether or not an inmate gains a constitutionally vested interest in a formally announced sentence depends upon the nature and purpose of the sentencing and/or dispositional process. For illustration, if judicial officials deferred all sentencing until they received information to base a referral to Patuxent upon, it would be perfectly apparent that the only issue involved is the constitutionality of an indeterminate sentence for specified crimes; such sentences are constitutionally permissible. *See Graham v. West Virginia, supra.* Does the intervention of a conventional sentence between the determination of guilt and the dispositional decision to commit an individual for an indeterminate sentence lead to a different conclusion?

It must be noted that a sentence is the final judgment in a criminal case. *See Corey v. United States*, 375 U.S. 169 (1963); *Berman v. United States*, 302 U.S. 211 (1937). In *Corey v. United States, supra* at 174, this Court stated:

> "A sentence under these provisions, which is imposed only after the whole process of criminal trial and determination of guilt has been completed, sufficiently satisfies conventional requirements of finality for purposes of appeal."

An individual must have been tried, convicted, and sentenced for specified crimes to be referred to Patuxent, Art. 31B, § 6(a), of the Annotated Code of Maryland. The conviction and sentence are jurisdictional requirements in considering this referral. *See Gee v. State,* 239 Md. 604, 212 A. 2d 269 (1965).

Thus, the function of the final judgment or sentence in a criminal case in Maryland, for Art. 31B purposes, is to define a class of individuals subject to civil commitment to Patuxent; the purpose of the sentence is emphatically not to limit the time of treatment. In *Graham v. West Virginia, supra,* the use of a prior criminal sentence as a basis for life imprisonment was held constitutional. The present situation differs from *Graham* and other cases only in that the statutory scheme establishing the basis of commitment is crafted with greater care.

The interest that an inmate has in knowing when his sentence will be completed is a real one. However, in the early stages of his confinement,[33] the State submits that such an interest is not vital. It is pertinent to note that the State of Maryland protects the expectancy of release held by an inmate during the later stages of his sentence. *See* Art. 31B, § 6(c), Md. Ann. Code (1971 Supp.) (no court order for examination during last six months of sentence).

In contrast to this less than vital interest of the inmate at the early stage of his confinement is the compelling interest of the State in not allowing an individual referred for examination to "antisocially wait out his allotted time." *Director v. Daniels, supra* at 40.

---

[33] Most requests for examination of inmates are made before or during the very early stages of confinement.

CONCLUSION

After Petitioner's trial and conviction for attempted rape and for assault on a police officer, the trial judge, in considering disposition, was confronted with his criminal record which included a prior rape and other crimes of violence. Also, he was confronted with a psychiatric evaluation of the Petitioner concluding that he was an "actual danger to society" and recommending his referral to Patuxent Institution.

An individual psychiatrist's recommendation, while sufficient to sound a warning, is insufficient under the Maryland Defective Delinquency Act to amount to a full-scale recommendation of commitment although sufficient in many other states. Therefore, Petitioner was sentenced and then, by court order, referred to Patuxent for examination where he could be interviewed, tested, and examined by "at least three persons on behalf of the institution for defective delinquents, one of whom shall be a medical physician, one a psychiatrist, and one a psychologist." Art. 31B, § 7(a).

Petitioner came to the examination area at Patuxent on August 10, 1966. From that time up to and including February 14, 1972, he formally refused to be examined, tested, and/or interviewed at least eighteen times and formally refused schooling.

And why does he refuse? If it is because of a lack of "trust" in his psychiatrists, this Court must tell him that the State of Maryland has an overwhelming interest in ensuring that defective delinquents, who are symptomically plagued with an untrusting, exploitive nature, are not exempt from treatment for this disease merely because they display one of its virulent manifestations. If it is because of the much-vocalized, never-proven risk of criminal incrimination, this Court must recognize and reaffirm

that the records reveal that, in Patuxent's seventeen-year history of operation, this risk has never materialized due to a combination of statutory, judicial, and administrative protections given to inmate confidences. If it is because of the fear of civil commitment, this Court must denounce and destroy the myth that misconduct brings reprieve and the hope that in silence there is security. This denunciation is necessary and proper because only through cooperation is diagnosis possible; only through diagnosis is treatment possible; and through treatment the recurring nightmare of recidivism can become past history instead of an ever-present fear.

Moreover, Petitioner's present fear of commitment and a lost lifetime are more in his mind than in reality, since about half of those diagnosed are not committed and, of those committed, the average stay is five years. For if this Court were to hold that Petitioner's silence is golden, then it would debase the credibility behind each and every commitment statute which places a premium upon ensuring that an individual committed can be an individual treated. The twenty-five jurisdictions which have embarked upon a statutorily mandated journey to a more humane correctional system ought not find the road washed out.

The State of Maryland asks for nothing more than the tools and procedures necessary to implement the "right to treatment"; after the years of social soul-searching, legislative craftsmanship, and administrative concern and success necessary to make Art. 31B a reality, the State of Maryland deserves nothing less.

It is an absurdity to think that for some reason the administration of Patuxent Institution desires to maintain a situation where the inmate does not cooperate with the

commitment examination. Obviously an epidemic of refusals to participate in commitment examination frustrates the work of the Institution and in no wise achieves the Institution's goal of returning the patient to a useful role in society. Petitioner suggests the absurd and invites us to myopically view a situation which is removed from our more atavistic solutions to anti-social conduct. It is ironic that Petitioner's greatest fear may well be the realization of his own illness.

Thus, it is respectfully submitted that the judgment of the Court of Special Appeals in and for the State of Maryland be affirmed, making possible the vision of Dr. Emory F. Hodges, who said:

> "I predict that most states will enact a similar statute within the next five to eight years. I further predict that 20 years hence psychiatric historians will regard this statute as one of the major accomplishments of the middle third of the 20th century."

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,
HENRY R. LORD,
Deputy Attorney General
of Maryland,
EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,
DONALD R. STUTMAN,
JOSEF ROSENBLATT,
HARRY A. E. TAYLOR,
Assistant Attorneys General
of Maryland,
Attorneys for Respondent.

APPENDIX A

AFFIDAVIT

State of Maryland, Anne Arundel County, to wit:

I Hereby Certify that on this 13th day of April 1972, before me, the Subscriber, a Notary Public of the State of Maryland, personally appeared Giovanni C. Croce, M.D. and made oath in due form of law that he is the duly appointed Associate Director (Psychiatry) of Patuxent Institution; That at the request of the Attorney General of Maryland he has been requested to file the following Affidavit regarding the ability of Patuxent Institution to evaluate a patient without the benefit of a personal examination pursuant to Article 31B, Annotated Code of Maryland.

The purpose of the psychiatric examination is to discover the origin and evolution of such personality disorders as may be interfering with the efficiency and the social adjustment of the patient. Psychiatric examination is accomplished first from the anamnesis (total history) given by others, and second from the direct personal examination of the patient. The anamnesis will provide a biographical and historical perspective of the personality and a clear picture of the living person as a specific human being with his individual problems. Psychiatric social examination has, therefore, as its immediate end, an understanding of the patient's personality and behavior, approaching the problem from a developmental point of view, bringing together data concerning the individual's heredity, his physical and mental make-up, his social and material environment, the personalities in the family group and his reaction to them from the time of childhood to the present.

The second part of the examination consists of the direct observation of the clinical picture presented by the patient.

Understanding of the patient's illness can be achieved only through a mental examination, which is done by a clinical study of a personality and should aim at a comprehensive appraisal of the patient. The psychiatric examination is commonly used to refer to the results of the mental status examination of the patient. Such an examination must, of course, include a thorough physical and neurological examination, together with all indicated laboratory examinations sufficient to discover all structural, functional, somatic and metabolic factors. Through the direct examination, the psychiatrist seeks to discover the relationship between the patient's past and the clinical picture that he presents at the time of the examination. Another purpose of the direct examination is to ascertain the patient's biologically, socially and psychologically determined needs.

The mental examination, which is fundamentally a personality study, will provide the examining psychiatrist with the appropriate information which will enable him to reach a diagnosis. As a matter of fact, as one observes the patient and proceeds with the examination, he will note various characteristics in the symptomatology as to suggest into which of two general types of reaction the disturbance falls, the organic or the psychogenic. Obviously, such a distinction could not be possible if the patient is not directly examined. The mental status examination contains specific references to the following areas: (1) attitude and general behavior, (2) consciousness, (3) apperception, (4) affectivity and mood, (5) conation and expressive aspects of behavior, (6) association and thought processes, (7) thought content and the mental trend, (8) perception, (9) memory, (10) fund of information, (11) judgment, (12) insight, (13) personality maturity, (14) psychometry and (15) mental deterioration and its measurement. (See Noyes, *Medical Clinical Psychiatry*, pp. 142 to 151; and, Arieti, *American Handbook of Psychiatry*, Volume One, pp. 218 to 226)

As indicated above, a psychiatric examination is an extensive study of the whole personality, with special emphasis on thought contents and their accompanying emotions. Only by the direct study of the patient's psychiatric, clinical picture and the individual characteristics and the assets of the patient is it possible to reach a diagnosis. Without some awareness of the patient's symptomatology, the psychiatrist cannot expect to make a diagnosis or properly make a valid evaluation, prognosis, degree of impairment and predisposition, nor will it be possible to make any plans for a future rehabilitation program. In the mental examination, the psychiatrist infers disturbances by noting abnormalities in the way the patient perceives, integrates and responds to the environment.

Although records and previous psychiatric and psychological examinations might be available, it is virtually impossible, by considering this exclusively, to reach a valid evaluation of the patient's present mental condition. On the contrary, such a narrowness might lead to absurdities and false interpretation of the patient's clinical picture. Many symptoms have adaptive and defensive values, others do not. It should be kept in mind that a personality might be defined as a sum of total reactions of a person to the environment. Perception, intellectual functions and affective states all influence this reaction and, therefore, it is imperative that these must be directly and carefully examined to be able to reach a valid understanding of the patient's overall personality structure.

In Testimony Whereof, I hereunto set my Hand

GIOVANNI C. CROCE, M.D.

As Witness My Hand and Notarial Seal

WAYNE LEE ELLIOTT,

(Seal) Notary Public.

APPENDIX B

AFFIDAVIT

State of Maryland, Anne Arundel County, to wit:

I Hereby Certify that on this 13th day of April, 1972, before me, a Notary Public of the State and County aforesaid, personally appeared Dr. Sigmund Manne, Chief Psychologist at Patuxent Institution, who made oath in due form of law as follows; that at the request of the Attorney General of Maryland he has caused to be written the following affidavit regarding psychological testing procedures at Patuxent Institution; For a psychologist to accept a past record and the observations of non-clinically trained observers as the basis for determination of Defective Delinquency would be an invalid process. When observations can be made over a long period of time by a trained observer, and then are coupled with the record, the process is more valid. The only valid method of determining present personality structure couples the above method with personal interview, and the placement of the patient in a standardized, structured situation; namely, psychological testing. If any of these factors are missing, an adequate determination of Defective Delinquency is not possible.

In considering the interview, Harry Stack Sullivan is quick to write, ". . . probably most people go into any interview with quite mixed motivations; they wish that they could talk things over frankly with somebody, but they also carry with them, practically from childhood, ingrained determinations which block free discussion." (Sullivan, H. S., The Psychiatric Interview, W. W. Norton and Co., Inc. New York, 1954, pp. 9-10). He further states, "To sum up, a patient's patterns of difficulty arise in his past experience and variously interpenetrate all aspects of

his current interpersonal relationships. Without data reflecting many important aspects of the patient's personality, the patient's statement of symptoms and the psychiatrist's observation of signs of difficulty are unintelligible.". (Ibid. pp. 15-16).

Although interviews may be divided into evaluative and therapeutic interviews, we shall here confine ourselves only to the evaluative interview. This can be further subdivided into an open interview, semi-structured interview, and structured interview. For the purposes of psychological testing, the evaluative interview is, generally of a semi-structured or structured nature. Questions are posed to the patient which are variable in a semi-structured interview and are designed to elicit information concerning the patient's background, attitudes, emotions, conflicts, defenses, and personality. In a structured interview, the questions are fixed, as is the order in which the questions are posed. However, the aim of the structured interview is the same as in the semi-structured interview, but circumscribes the examiner's freedom to deviate from the questions. Both are designed to elicit as much information as possible so that when combined with information derived from other sources, viz., test procedures, a valid determination of a patient's present condition can be achieved.

General considerations underlying psychological testing are that ". . . a person's distinctive style of thinking is indicative of ingrained features of his character make-up.", ". . . responses to the various test items of the battery we use are, almost entirely, verbalized end-products of thought processes initiated by these items." ". . . the subject must be made to think in a variety of problem-situations to enable the examiner to distinguish the pervasive, fundamental or pathological aspects of his characteristic adjustment-efforts. In any one situation he may present a

one-sided picture, in a variety of situations — in a battery of tests — a rounded and hierarchical picture can be expected." (Schafer, R., The Clinical Applications of Psychological Tests, International Universities Press, Inc. New York, New York, 1951).

Evaluation of the patient's present condition by means of standardized psychological test instruments is the integral part of the procedure at Patuxent Institution. The basic battery of psychological test instruments used at Patuxent Institution consists of (1) Wechsler Adult Intelligence Scale (WAIS), (2) Rorschach Inkblot Test, (3) Bender Visual Motor Gestalt Test, and (4) House-Tree-Person Test (HTP). Valid and reliable evaluation is considered the cornerstone of all clinical work (Thorne, F. C., Principles of Psychological Examining, Journal of Clinical Psychology, 1955). Buss (Buss, A Psychopathology, John Wiley and Sons, Inc., New York, 1966) describes psychological evaluations as a three part process involving a gathering of information and observations concerning the subject, placing the subjects in a category or class, and a drawing of inferences. This last step in the evaluative process concerns making a prediction of what the individual will do in situations other than the present one. (Anastasi, A., Psychological Testing, The MacMillian Co., New York, 1968).

The differential use of psychological testing is the process of identifying a disorder and distinguishing it from other disorders (Goldenson, R. M., The Encyclopedia of Human Behavior, Doubleday and Co., Inc., Garden City, New York, 1970). This is a difficult problem since (1) disorders may share symptoms, (2) symptom patterns may vary from subject to subject, (3) the same subject may exhibit different symptoms at different times, and (4) subjects may have more than one problem. These problems point up

the need to follow Thorne's (op. cit.) dictum to identify and judge all of the relevant factors at all levels of organization.

Threats to the reliability and validity of the evaluative process can occur at any of the previously mentioned three steps. If the observations gathered are faulty or incomplete, if the individual is incorrectly categorized, or if the inferences drawn are not based on fact, the evaluative process can be unreliable or invalid.

Anastasi (op. cit.) defines the use of psychological instruments as an objective and standardized measure of a sample of behavior. Standardized in this sense indicates a uniformity of procedure and of test instruments. Psychological testing is thus the application of the scientific method to a subject. The individual is the independent variable; all variance from test situation to test situation should be attributable to the independent variable, the subject being tested.

Psychological testing is thus a process of comparison, involving the detection of individual differences, and measuring these differences against normative data. One does not pass or fail a psychological test, one is only compared with other subjects in a culture, or with ones peers. In general, the norms against which a subject is compared are drawn from a professional body of knowledge.

Psychological testing is a viable and integral part of an evaluative process since it provides a complex of circumstances in which a subject's performance and behavior may be observed in a relatively short period of time. An individual presents a social face to the world (Jung, C. G., Collected Works, Two Essays on Analytical Psychology, Vol. 7, Pantheon Press, New York, 1953). Without the use of tests it could take long periods of continuous psy-

chological contact in order to ferret out the motives which are active but hidden behind the persona. An individual may not only seek to hide himself from the world, but it may also be necessary to hide his motives from himself, (Schaffer, L. E., and Shoeban, E. J. Jr., The Psychology of Adjustment, Houghton-Mifflin Co., Boston, 1956). In this situation the subject could not consciously present his true self to the examiner, even if he wished to do so. Psychological testing affords the examiner the possibility of knowing the subject, in a brief period of time, at several levels. It also provides for an up to date picture of a subject's current mode of function at multiple levels. Without psychological examination, the evaluative process would require twenty-four hour observation over a protracted period of time by trained observers, which is economically unfeasible from the standpoint of both time and money, and would be much less valid.

In tracing the history of psychological tests, Linden and Linden (Linden, K. and Linden, J., Guidance Monograph Series, Lilly S., Stone, C., and Shintzer, B., eds., Houghton-Mifflin Co., Boston, 1968) indicate that such tests were originally used to differentiate one individual from another on the basis of certain personality traits. In referring specifically to intelligence, Wechsler (Wechsler, D., Measurement of Adult Intelligence, 3rd edition, Williams & Wilkens Co., Baltimore, 1954) postulates the following definition, "Intelligence is the aggregate or global capacity of the individual to act purposefully, think rationally and to deal effectively with his environment." In keeping with this, Harrower (Harrower, M. in Wolman, B., Handbook of Clinical Psychology, McGraw-Hill Book Co., New York, 1965) states that psychological tests are used to describe an individual's functioning in its totality as well as to provide useful hypotheses about his future performance. Psycho-

logical testing, as Rosenzweig (Rosenzweig, S., Psychodiagnosis, New York, New York, 1949) indicates, is a combined process illuminating personality dynamics as well as providing for categorization of the subject. Thorne (Thorne, F. C., Theoretical Foundations of Directive Psychotherapy in Current Trends in Clinical Psychology, Ann. Sci, New York, 1948-49) extends this concept by indicating that tests assist in demonstrating etiological factors, estimate the extensity or intensity of the morbid process in relation to actuarial data concerning type and severity, determining a prognosis or probable cause, to provide a rational basis for specific psychotherapy, and to formulate a dynamic hypothesis concerning the nature of the pathological process. As Anastasi (op. cit.) noted, tests are considered as behavior samples from which predictions regarding other behavior can be made, an opinion which is amplified by Cronbach (Cronbach, L. J., Essentials of Psychological Testing, 2nd edition, Harper & Bros., New York, 1960) in discussing decision making based on psychological tests.

Thus, authorities agree that psychological tests are a vital part of the evaluation process. They are used to determine an individual's level of intellectual functioning from which decisions can be made with the subject concerning academic performance, the necessity for remedial action, and possible academic goals. Psychological tests are used to help develop insights into the dynamics or motivations underlying a subject's behavior from which meaningful predictions can be made about future behavior, and, perhaps more importantly, to help develop meaningful strategies in the psychotherapeutic relationships. The tests also serve as a gauge to measure the outcomes of therapy and to illuminate possible areas in need of further exploration. Psychological testing is not limited to un-

covering pathology, but is used to determine a subject's assets and potentialities, which in turn is used to aid the subject in redirecting or intensifying efforts in specific areas, thus helping him toward a more meaningful and self-fulfilling existence.

Although psychological testing is an important part of the evaluative process, it is important to know that proper tests have been given, and that the qualifications of the examiner are adequate. When the Patuxent Institution requests information from other agencies, it is not uncommon that only a summary of the psychological report is included. There is no way of determining what psychological procedures have been used, nor the qualifications of the examiner. The importance placed on the qualifications of the examiner can be seen in the restrictions placed on the sale of specific psychological tests by the Psychological Corporation of America. (The Psychological Corporation Test Catalog, 1972, The Psychological Corporation, 304 East 45th Street, New York, New York, 10017). When the staff of any institution does not have knowledge of the tests used previously or the qualifications of the examiner, it is virtually impossible to assess the validity of the examination.

When information concerning the psychological tests that are the basis of the reports from other institutions is known, too frequently the understaffed Psychology Department of these institutions has had to utilize "group" tests rather than "individual" tests in order to provide services as required. This is particularly true of correctional institutions. In every circumstance group tests are neither so valid nor so reliable as individual tests. In addition, data obtained from group testing of an incarcerated population is notoriously unreliable. It is easy to see that

group tests make no provisions for personal interviews, gathering of background information, or observation of subjects. While discussing malingering Anastasi notes that there are ". . . a few testing situations, especially in the examination of criminal offenders . . . in which the objectives of individual subjects may be fundamentally at cross-purposes to those of the examiner, a conflict which no amount of rapport may be able to reconcile." (Anastasi, A., op. cit.).

I.Q. scores reported from other institutions quite frequently are based on group intelligence tests. Even assuming that the subject was motivated to do his best, such group tests tend to correlate poorly with an individual test of intelligence such as the WAIS, the correlation varying anywhere from .40 to .80 (Anastasi, A., ibid.).

The group personality test most frequently used is the Minnesota Multiphasic Personality Inventory (MMPI). (Hathaway, S. R. and Meehl, P. E., An Atlas for the Clinical Use of the MMPI, The University of Minnesota Press, Minneapolis, 1951). Anastasi (Anastasi, A., Ibid.) indicates this can be a highly valid instrument when used properly, but it does demand that the subject have a seventh or eighth grade reading level, and, in fact, the admonition is that it not be used with subjects of low educational or intellectual level. At Patuxent Institution, of those subjects who did not have a High School Diploma entering prior to 1965 had an average grade placement of 5.0, while those entering Patuxent Institution after 1965 had an average grade placement of 4.6.

Though the MMPI has a built-in scale to detect if a subject is lying, experience at Patuxent has shown this scale to be relatively ineffective. The subjects at Patuxent Institution do manipulate the MMPI and try to place themselves in the best light possible. Since such subjects are

not motivated to, or cannot, display their true selves, this instrument cannot be the choice in an evaluative process.

In addition to the problem of group tests, some examiners have favorite evaluative instruments which are little used by the profession as a whole, though they may provide the specific examiner with information. The validity of these instruments frequently depends on the clinical intuition of the examiner. The psychological examination at Patuxent Institution consists of tests (as noted earlier) accepted by the profession and each instrument has a significant background of scientific investigation evidenced by its extensive bibliography.

Inasmuch as the reports of prior psychological examinations gathered by Patuxent Institution frequently are summaries, it is impossible to determine their validity. The actual protocol is not available and the summary is frequently an overall summary of the subject's overall behavior. Such summaries are often from six months to twelve years old. Since the essence of human personality is change, it is patently unfair and unprofessional to base a current evaluation or determination of Defective Delinquency on evaluative material which is out of date. Such information can be used as a basis as to the extent and intensity of change in the subject, particularly when it is compared to a current evaluation.

All the psychological tests used in the battery administered at Patuxent Institution are in general used throughout the United States, South America, and Western Europe. Extensive biblographies are available on each instrument. In the latest issue of Personality Tests and Reviews, Gryphon Press, Inc., Highland Park, New Jersey, 1970, Buros, O. K., editor, lists 3,749 references for the Rorschach Inkblot Test. In one cited study by Benjamin and Ebaugh, examiners' evalulations of subjects were compared with interviewers' evaluations, and complete agreement was

achieved in 85% of the cases. As the profession continues in its attempts to refine its instruments into more sophisticated evaluative instruments, new approaches are used to develop the validity of these instruments. As an example, current research on the Rorschach Inkblot Test is focused more on the stimuli inherent in the instrument, and understanding the properties of the stimuli as it interacts with a perceiving subject.

The WAIS standardization is well known. Wechsler (Wechsler, D., WAIS Manual, The Psychological Corporation, New York, New York, 1955) standardized this instrument on the basis of age, sex, geographic region, urban-rural residence, race, occupation, and education. These variables were the criteria used in assembling the standardization population in accordance with the 1950 U.S. Census. Using the odd-even method of determining the reliability coefficient, corrected by the Spearman-Brown formula, reliability was found to be .97. standard error of measurement 2.60, which indicates very high reliability.

Hammer, in describing the House-Tree-Person Test (HTP) indicates that drawings are never a primary tool in a test battery but are a graphic adjunct to verbal techniques (Hammer, E. F., DAP: Back Against the Wall?, Journal of Consulting and Clinical Psychology, Vol. 33, 1969). He further notes that the HTP is the third most commonly used instrument. Swensen (Swensen, C. H., Empirical Evaluation of Human Figure Drawings 1957-1966, Psychological Bulletin, Vol. 70, 1968) has observed increasing empirical support for the use of drawings as a clinical tool. Haworth (Haworth, M. R., in Buros, O. K., ibid.) reaches a similar conclusion emphasizing that the degree of meaningful data produced depends on the experience and orientation of the examiner and that global interpretation of this data will be most valid. When used alone the HTP can provide some clues as to the etiology of patho-

logical perceptions of the environment. Its power is increased markedly when it is used as one of a battery of tests as part of an evaluative process which includes the gathering of historical data, personal interview, and psychological tests.

The final psychological test used in the battery of tests administered to a subject at Patuxent Institution is the Bender Visual Motor Gestalt Test (Bender, L. A., Visual Motor Gestalt Test and its Clinical Use, Research Monograph American Orthopsychiatric Association, 1938). Reliability of this instrument is quite good, when evaluated by interscorer reliability. When a test-retest reliability is determined, the dynamic quality being measured results in low reliability. Thus, this instrument reflects the subject's current perceptual level. Billingslea (Billingslea, F. Y., The Bender-Gestalt: A Review and A Perspective, 1963) in reviewing the literature indicated this instrument could be a valuable additional tool in a battery of tests. He also found support for the use of this test in a battery looking for signs of organic brain damage.

When any of the elements of the psychological evaluation are missing, the validity of the evaluative procedure is lowered. To do a blind evaluation, to merely rely on reports of others, is to do a disservice to the subject, and is something an ethical practitioner would not do. Paraphrasing Dr. Robert M. Allen's comments in classes on psychological evaluation; blind evaluations are for blind men.

In Testimony Whereof, I hereunto set my hand

SIGMUND H. MANNE, Ph.D.

As Witness My Hand and Notarial Seal.

WAYNE LEE ELLIOTT,

(Seal) Notary Public.

APPENDIX C

AFFIDAVIT

State of Maryland, Anne Arundel County, to wit:

I Hereby Certify that on this 13th day of April 1972, before me, the Subscriber, a Notary Public of the State of Maryland, personally appeared Harold M. Boslow, M.D. and made oath in due form of law that he is the duly appointed Director of Patuxent Institution; That at the request of the Attorney General of Maryland he has been requested to file the following affidavit regarding the ability of Patuxent Institution to evaluate Edward Lee McNeil pursuant to the information contained in his file without the benefit of personal interview according to Article 31B, Section 7 (a) of the Maryland Code.

Edward Lee McNeil was admitted to Patuxent Institution on August 10, 1966, following conviction in the Criminal Court of Baltimore City on a charge of Attempted Rape and Assault on a Police Officer, and sentenced on July 29, 1966 to a term of not more than five (5) years.

Upon admission, the patient was seen by Theodore A. Tasony, M.D., a staff psychiatrist, and in an Admission Note dated September 5, 1966, Dr. Tasony indicated that the patient completely denied the offenses for which he was sentenced. Subsequent to the Admission Note, ten (10) attempts were made to have this patient evaluated psychiatrically, with the patient refusing on each occasion. During the same period, five attempts were made to examine the patient psychologically, the latest one being attempted on February 14, 1972.

In the course of obtaining data from other agencies, the Institution received a copy of a psychiatric examination

done by the Medical Service of the Supreme Bench of Baltimore City, dated July 19, 1966. We were also provided with a Social evaluation from the Childrens' Center, dated June 13, 1960, and a report from the Circuit Court of Baltimore City, Division of Juvenile Causes, dated May 20, 1960. These earlier two reports contained no psychiatric or psychological examination material.

In the psychiatric evaluation done for The Medical Service of The Supreme Bench by Dr. John Sheehan, dated July 19, 1966, Dr. Sheehan stated in his summary that the psychological examination indicated a full-scale I.Q. of 104 and also indicated impulsiveness and vulnerability to anxiety. It also mentioned fantasy preoccupations which have to do with women, blood, high heel shoes, and thighs. The presence of such bizaare fantasies may well indicate a basic schizophrenic process which can only be evaluated by a thorough psychiatric and psychological examination. Unfortunately, we do not have the protocol which accompanied the 1966 psychological examination, nor do we know the tests that were used in that examination. There are also internal contradictions present in the summary. Dr. Sheehan states, "It is difficult to assign the diagnosis to this young man, and he is not anti-social in the sense that he uses society as an enemy to be attacked. His unstable character structure does not permit adequate control when under stress and we do not know enough about his social life — or lack of it. I would suggest the diagnosis of personality pattern disturbance, schizoid type, which encompasses vulnerability stress. This young man is certainy a danger to society." Dr. Sheehan thus indicates his uncertainty about the diagnosis and seemingly contradicts himself by stating that he is not antisocial, and yet is a danger to society.

This, of course, is the very question to which this Institution must address itself in determining whether or not this individual is a defective delinquent, and such determination cannot be made unless a personal interview with the patient is made which would include an estimate of his intelligence, his contact with reality, whether or not a schizophrenic process does exist, or whether any organic factors are present in this patient. These are things which can only be determined by direct interview with the patient. Furthermore, Dr. Sheehan felt that this patient would commit further offenses, and recommended that he be sent to Patuxent Institution for a more intensive study and evaluation, thus indicating that he felt his examination and evaluation required a more detailed psychiatric and psychological investigation. Dr. Sheehan's examination was done on July 19, 1966 as a pre-sentence investigation, and in order to determine the patient's present status, a complete psychiatric and psychological evaluation must be done at the present time. The examination of the Supreme Bench Medical Service is nearly eight (8) years old and certainly should be considered out of date, and any report made, based upon that old examination, would certainly not be considered valid at the present time.

It should be emphasized that Dr. Sheehan, himself, had uncertainty and doubts about this patient's diagnostic and psychiatric picture, and asked to have a more thorough evaluation done. Obviously, based on the information contained in the file in 1966, an evaluation could not have been done at that time. In this regard, I recommend referral to affidavits filed in this case by Giovanni C. Croce, M.D., Associate Director (Psychiatry) and Sigmund H. Manne, Ph.D., Chief Psychologist, both of Patuxent Insti-

tution, regarding psychiatric and psychological examinations.

In Testimony Whereof, I hereunto set my Hand

HAROLD M. BOSLOW, M.D.

As Witness My Hand and Notarial Seal

WAYNE LEE ELLIOTT,

(Seal) Notary Public.

APPENDIX D

CHART OF PETITIONER'S REASONING

Constitution requires an opportunity for a hearing

BUT →

Petitioner is indefinitely confined without a hearing

↓

THEREFORE

↓

equal protection violation

↓

and

↓

no "speedy trial"

↓

and

↓

cruel and unusual punishment

↓

and

↓

involuntary servitude

↑

THEREFORE

↑

[potential of indefinite confinement without treatment]

↑

THEREFORE ←

BECAUSE →

State refused to institute a hearing without a personal examination

↓

EVEN THOUGH

↓

answers to personal questions asked at examination not an absolute prerequisite to diagnosis

↓

SINCE *other sufficient information is available*

AS SHOWN BY

↓

other findings made without information from personal examination

[cannot treat untrusting prisoner]

↑

THEREFORE ←

AND →

Petitioner will not submit to a personal examination

↓

BECAUSE

↓

he has the right to assert his privilege against self-incrimination

↓

SINCE

↓

(1) *disclosures can be used to criminally incriminate him;* and (2) disclosures can be a basis for Patuxent confinement

↓

AND

↓

even complete immunity a bad idea because of "need for mutual trust" (42) and no mutual trust where prisoner forced to talk

This chart is set forth to show the importance of certain factual assumptions (here italicized) to Petitioner's argument.

Also worthy of note is the manner in which the "lack of trust" assertion has a tendency to create a circular argument.